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CASES

ON

AMERICAN CONSTITUTIONAL LAW.

EDITED BY

CARL EVANS BOYD, PH.D.

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PREFACE.

In making this collection of cases, it was not my purpose to attempt to rival the notable collection of Professor Thayer. I have had the more modest design of bringing together within the compass of a single volume a sufficient number of the leading decisions of the Supreme Court of the United States on constitutional law to form the basis of a course in that subject. The so-called "case system" of study is applied to almost all branches of the law, but its application to constitutional law has been retarded by the obvious impracticability of referring a class to the original reports and by the want of a suitable case book of moderate size. It is to meet such requirements that this collection has been formed.

A work of this kind is necessarily a compromise between the desirable and the attainable. The exigencies of space have compelled me to exclude numerous instructive decisions which many persons may expect to find and which I would have been glad to print. For the further economy of space, arguments have been omitted and the notes are few. It seemed that the pages required for these features could be more profitably devoted to decisions which must otherwise be excluded.

As to the text of the cases, all the decisions from December Term, 1855, (18 Howard), have been taken from the official reports. Cases decided before 18 Howard are taken from Curtis' Decisions of the Supreme Court of the United States. The cases are reprinted *verbatim et literatim* except that certain parts, particularly statements of facts, have been shortened, and matter not necessary

to the elucidation of the constitutional question involved has been omitted. These changes have been indicated in the usual manner.

The date which has been assigned to each decision is, as a rule, the year in which the term began at which the decision was made. This applies to all the cases decided prior to October Term, 1882, (108 U. S.), except the Dred Scott case, the Prize Cases, Hepburn v. Griswold, and the Legal Tender Cases. The relation of these decisions to contemporary affairs made their exact date important. It is to be regretted that the Reports of the Supreme Court prior to 1882 do not indicate the day on which each decision was rendered.

Professor Thayer has greatly facilitated my work by permitting me to use the sheets of his Cases as manuscript for the printer. It is also due to him to say that I was familiar with his comprehensive collection long before I began making this one. How far this fact may have influenced my selection of cases and my method of treating them cannot be determined. A general acknowledgment of indebtedness must therefore suffice. In this connection, I would also express my obligations for the many helpful suggestions which I have received from Head Professor Judson and Dr. Ernst Freund of the University of Chicago.

CARL EVANS BOYD.

Chicago, April 25, 1898.

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CASES

ON

AMERICAN CONSTITUTIONAL LAW.

THE CONSTITUTION OF THE UNITED STATES.

[1] We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION I.

[2] All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION II.

[3] The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

[4] No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

[5] Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration

shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[6] When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

[7] The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

SECTION III.

[8] The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

[9] Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year, and of the third class, at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

[10] No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

[11] The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

[12] The Senate shall choose their other officers, and also a President pro tempore in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

[13] The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the members present.

[14] Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy

any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law.

SECTION IV.

[15] The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

[16] The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION V.

[17] Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

[18] Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member.

[19] Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

[20] Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION VI.

[21] The Senators and Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the Treasury of the United States. They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

[22] No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and

no person holding any office under the United States shall be a member of either house during his continuance in office.

SECTION VII.

[23] All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

[24] Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

[25] Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII.

[26] The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

[27] To borrow money on the credit of the United States;

[28] To regulate commerce with foreign nations and among the several States, and with the Indian tribes;

[29] To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

[30] To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

[31] To provide for the punishment of counterfeiting the securities and current coin of the United States;

[32] To establish post-offices and post-roads;

[33] To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

[34] To constitute tribunals inferior to the Supreme Court;

[35] To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

[36] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

[37] To raise and support armies, but no appropriation of money to that use shall be for a longer time than two years;

[38] To provide and maintain a navy;

[39] To make rules for the government and regulation of the land and naval forces;

[40] To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

[41] To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

[42] To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

[43] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SECTION IX.

[44] The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

[45] The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[46] No bill of attainder or ex post facto law shall be passed.

[47] No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

[48] No tax or duty shall be laid on articles exported from any State.

[49] No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

[50] No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

[51] No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION X.

[52] No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

[53] No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

[54] No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION I.

[55] The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

[56] Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or

person holding an office of trust or profit under the United States, shall be appointed an elector.

[57] [The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.][1]

[58] The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

[59] No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

[60] In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

[61] The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished

[1] **This clause of the Constitution has been superseded by the Twelfth Amendment.**

during the period for which he may have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

[62] Before he enter on the execution of his office he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution of the United States."

SECTION II.

[63] The President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

[64] He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

[65] The President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION III.

[66] He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION IV.

[67] The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for

and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION I.

[68] The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION II.

[69] The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

[70] In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

[71] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION III.

[72] Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

[73] The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.

ARTICLE IV.

SECTION I.

[74] Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION II.

[75] The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

[76] A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

[77] No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION III.

[78] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

[79] The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

SECTION IV.

[80] The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V.

[81] The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or,

on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.

[82] All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the confederation.

[83] This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

[84] The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

[85] The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

[86] Done in convention by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.

George Washington, President, and Deputy from Virginia.

New Hampshire—John Langdon, Nicholas Gilman.

Massachusetts—Nathaniel Gorham, Rufus King.

Connecticut—William Samuel Johnson, Roger Sherman.

New York—Alexander Hamilton.

New Jersey—William Livingston, David Brearly, William Patterson, Jonathan Dayton.

Pennsylvania—Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzsimons, Jared Ingersoll, James Wilson, Gouverneur Morris.
Delaware—George Read, Gunning Bedford, Jr., John Dickinson, Richard Bassett, Jacob Broom.
Maryland—James McHenry, Daniel of St. Thomas Jenifer, Daniel Carroll.
Virginia—John Blair, James Madison, Jr.
North Carolina—William Blount, Richard Dobbs Spaight, Hugh Williamson.
South Carolina—John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler.
Georgia—William Few, Abraham Baldwin.

Attest: William Jackson, Secretary.

AMENDMENTS.

ARTICLE I.

[87] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

[88] A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

[89] No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

[90] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly de-

scribing the place to be searched, and the person or things to be seized.

ARTICLE V.

[91] No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

[92] In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII.

[93] In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

[94] Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

[95] The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

[96] The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

ARTICLE XI.

[97] The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII.

[98] The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

[99] The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.

[100] Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

[101] Section 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

[102] Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[103] Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

[104] Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

[105] Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United

States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

[106] Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

[107] Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

[108] Section 2. The Congress shall have power to enforce this article by appropriate legislation.

I. THE VALIDITY OF LEGISLATION.

MARBURY v. MADISON.

1 Cranch., 137. Decided 1803.

At the last term, namely, December term, 1801, William Marbury, Dennis Ramsey, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, Esq., late Attorney-general of the United States, severally moved the court for a rule to James Madison, Secretary of State of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the District of Columbia. This motion was supported by affidavits of the following facts: that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late President of the United States, nominated the applicant to the senate for their advice and consent to be appointed justices of the peace of the District of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, etc., and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison, as secretary of state of the United States, at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of state or any officer in the department of state; that application has been made to the secretary of the senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to show cause on the fourth day of this term. This rule having been duly served, Mr. Lee read the affidavit of Dennis Ramsey, and the printed journals

of the senate of 31st January, 1803, respecting the refusal of the senate to suffer their secretary to give the information requested. He then called Jacob Wagner and Daniel Brent, who had been summoned to attend the court, and who had, as it is understood, declined giving a voluntary affidavit. They objected to being sworn, alleging that they were clerks in the department of state, and not bound to disclose any facts relating to the business or transactions in the office.

The court ordered the witnesses to be sworn, and their answers taken in writing, but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any.

Mr. Lincoln, attorney-general, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as secretary of state at the time when the transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state.

The questions being written, were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of two kinds.

1st. He did not think himself bound to disclose his official transactions while acting as Secretary of State; and,

2d. He ought not to be compelled to answer anything which might tend to criminate himself.

Mr. Lincoln thought it was going a great way to say that every Secretary of State should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider the subject.

The court said that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that anything was communicated to him in confidence he was not bound to disclose it; nor was

he obliged to state anything which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.

Mr. Lincoln then prayed time till the next day to consider of his answers under this opinion of the court.

The court granted it, and postponed further consideration of the cause till the next day.

At the opening of the court on the next morning, Mr. Lincoln said he had no objection to answering the questions proposed, excepting the last, which he did not think himself obliged to answer fully. The question was, what had been done with the commissions? He had no hesitation in saying that he did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office when Mr. Madison took possession of it. He prayed the opinion of the court whether he was obliged to disclose what had been done with the commissions.

The court were of opinion that he was not bound to say what had become of them; if they never came to the possession of Mr. Madison it was immaterial to the present cause what had been done with them by others.

Afterwards, on the 24th February, the following opinion of the court was delivered by the CHIEF JUSTICE. At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the Secretary of State to show cause why a mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the District of Columbia.

No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy in this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded...

The first object of inquiry is,

1st. Has the applicant a right to the commission he demands? . . . [The court holds that, having been duly appointed, he has a right to his commission.]

This brings us to the second inquiry, which is,

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? . . . [The court finds that they do.]

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for; and,

2dly. The power of this court.

1st. The nature of the writ. . . . This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." . . . The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as Congress shall, from time to time, ordain and establish. . . . In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. In all other cases, the supreme court shall have appellate jurisdiction." . . . If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. . . . To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. . . . It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such govern-

ment must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the great-

est improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their

conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government—if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

NOTE.—The principle that the courts have authority to pass upon the validity of legislation had been asserted in at least five States before the adoption of the Constitution,—viz., in Holmes v. Walton, in New Jersey, 1780; in Commonwealth v. Caton, in Virginia, in 1782; in Rutgers v. Waddington, in New York, in 1784; in Trevett v. Weeden, in Rhode Island, in 1786; and in Bayard v. Singleton, in North Carolina, in 1787. All these cases save the first are printed in Thayer's Cases, I, 55-80. In 1792 the Supreme Court of South Carolina, in the case of Bowman v. Middleton (1 Bay., 252), declared that an act passed by the Colonial Legislature in 1712, which took away the freehold of one man and vested it in another without any compensation or even a trial by the jury of the country, was "against common right, as well as

against Magna Charta," and "therefore ipso facto void." For a valuable discussion of these early constitutional cases, see an article on "The Relation of the Judiciary to the Constitution," by W. M. Meigs, in American Law Review, xix, 175 (1885). See also Coxe, The Judicial Power and Unconstitutional Legislation, 219-271. A most admirable discussion of the whole question is found in an article on "The Origin and Scope of the American Doctrine of Constitutional Law," by Prof. James B. Thayer, in Harvard Law Review, vii, 129 (1893). For an adverse view of the power of the courts over unconstitutional legislation, see Eakin v. Raub, 12 Sergeant and Rawle (Pennsylvania), 330, also printed in Thayer's Cases, I, 133. A list of cases in which the Federal Supreme Court has declared statutes or parts of statutes invalid is given in 131 U. S. Appendix, ccxxxv. The list is incomplete, one of the most conspicuous omissions being the Dred Scott case.

"The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded by the Judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred: in other words, the Constitution ought to be preferred to the statutes, the intention of the people to the intention of their agents." Hamilton, in The Federalist, No. 78.

"If they [the government of the United States] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void." John Marshall, in the Virginia Convention of 1788, Elliot's Debates, III, 553.

"To control the power and conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the American states." James Wilson, in the Pennsylvania Convention of 1787, Elliot's Debates, II, 432.

II. TAXATION.

HYLTON v. THE UNITED STATES.

3 Dallas, 171. Decided 1796.

This was a writ of error to the circuit court of the United States for the district of Virginia. The question raised, and all the facts necessary to be adverted to, appear in the opinions of the members of the court. . . .

The court delivered these opinions seriatim, in the following terms.[1]

CHASE, J. By the case stated, only one question is submitted to the opinion of this court: Whether the law of congress of the 5th of June, 1794 (1 U. S. Stat. at Large, 373), entitled, "An act to lay duties upon carriages for the conveyance of persons," is unconstitutional and void?

The principles laid down to prove the above law void, are these: That a tax on carriages is a direct tax, and therefore, by the constitution, must be laid according to the census directed by the constitution to be taken, to ascertain the number of representatives from each State. And that the tax in question, on carriages, is not laid by that rule of apportionment, but by the rule of uniformity, prescribed by the constitution in the case of duties, imposts, and excises; and a tax on carriages is not within either of those descriptions. . . .

The constitution evidently contemplated no taxes as direct taxes, but only such as congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed must ever determine the application of the rule.

If it is proposed to tax any specific article by the rule of apportionment, and it would certainly create great inequality and injustice, it is unreasonable to say that the constitution intended such tax should be laid by that rule.

[1] The Chief Justice, Ellsworth, was sworn into office in the morning; but not having heard the whole of the argument, he declined taking any part in the decision of this cause.

It appears to me that a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice. For example, suppose two States, equal in census, to pay eighty thousand dollars each, by a tax on carriages of eighty dollars on every carriage, and in one State there are one hundred carriages and in the other one thousand. The owners of carriages in one State would pay ten times the tax of owners in the other. A, in one State, would pay for his carriage eight dollars; but B, in the other State, would pay for his carriage, eighty dollars.

It was argued that a tax on carriages was a direct tax, and might be laid according to the rule of apportionment, and, as I understood, in this manner: Congress, after determining on the gross sum to be raised, was to apportion it according to the census and then lay it in one State on carriages, in another on horses, in a third on tobacco, in a fourth on rice, and so on. I admit that this mode might be adopted to raise a certain sum in each State, according to the census, but it would not be a tax on carriages, but on a number of specific articles; and it seems to me that it would be liable to the same objection of abuse and oppression, as a selection of any one article in all the States.

I think an annual tax on carriages for the conveyance of persons, may be considered as within the power granted to congress to lay duties. The term duty, is the most comprehensive, next to the general term tax; and practically in Great Britain, whence we take our general ideas of taxes, duties, imposts, excises, customs, &c., embraces taxes on stamps, tolls for passage, &c., &c., and is not confined to taxes on importation only.

It seems to me that a tax on expense is an indirect tax; and I think an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity, and such annual tax on it, is on the expense of the owner.

I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the constitution, are only two, to wit, a capitation or poll tax, simply without regard to property, profession, or any other circumstance; and a tax on land. I doubt whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax.

As I do not think the tax on carriages is a direct tax, it is unnecessary at this time for me to determine whether this court constitutionally possesses the power to declare an act of congress void, on the ground of its being made contrary to, and in violation

of the constitution; but if the court have such power, I am free to declare, that I will never exercise it but in a very clear case.

I am for affirming the judgment of the circuit court.

PATERSON, J. . . . What are direct taxes within the meaning of the constitution? The constitution declares that a capitation tax is a direct tax; and both in theory and practice, a tax on land is deemed to be a direct tax. In this way, the terms direct taxes, and capitation and other direct tax, are satisfied. It is not necessary to determine, whether a tax on the product of land be a direct or indirect tax. Perhaps the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it, or else the provision made against taxing exports would be easily eluded. Land, independently of its produce, is of no value. When the produce is converted into a manufacture it assumes a new shape; its nature is altered, its original state is changed, it becomes quite another subject, and it will be differently considered. Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point. If congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the States in the Union, then perhaps the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears, by the practice of some of the States, to have been considered as a direct tax. Whether it be so under the constitution of the United States is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt that the principal, I will not say the only objects, that the framers of the constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land. Local considerations, and the particular circumstances and relative situation of the States, naturally lead to this view of the subject. The provision was made in favor of the southern States. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled and not very productive. A majority of the States had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The Southern States, if no provision had been introduced in the constitution, would have been wholly at the mercy of the other States. Congress in such case might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure; so much a head in the first instance, and so much an acre in the second.

To guard them against imposition, in these particulars, was the reason of introducing the clause in the constitution which directs that representatives and direct taxes shall be apportioned among the States according to their respective numbers. . . .

All taxes on expense or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax. Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income. In many cases of this nature the individual may be said to tax himself. I shall close this discourse with reading a passage or two from Smith's Wealth of Nations.

"The impossibility of taxing people in proportion to their revenue by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities; the State not knowing how to tax directly and proportionably the revenue of its subjects, endeavors to tax it indirectly by taxing their expense, which it is supposed in most cases will be nearly in proportion to their revenue. Their expense is taxed by taxing the consumable commodities upon which it is laid out." Vol. iii, 331.

"Consumable commodities, whether necessaries or luxuries, may be taxed in two different ways; the consumer may either pay an annual sum on account of his using or consuming goods of a certain kind, or the goods may be taxed while they remain in the hands of the dealer, and before they are delivered to the consumer. The consumable goods, which last a considerable time before they are consumed altogether, are most properly taxed in the one way; those of which the consumption is immediate, or more speedy, in the other; the coach tax and plate tax are examples of the former method of imposing; the greater part of the other duties of excise and customs, of the latter." Vol. iii, p. 341.

I am, therefore, of opinion that the judgment rendered in the circuit court of Virginia ought to be affirmed.

IREDELL, J. I agree in opinion with my brothers, who have already expressed theirs, that the tax in question is agreeable to the constitution; and the reasons which have satisfied me can be delivered in a very few words, since I think the constitution itself affords a clear guide to decide the controversy.

The congress possess the power of taxing all taxable objects, without limitation, with the particular exception of a duty on exports.

There are two restrictions only on the exercise of this authority—

1. All direct taxes must be apportioned.
2. All duties, imposts and excises must be uniform.

If the carriage tax be a direct tax, within the meaning of the constitution, it must be apportioned. If it be a duty, impost, or excise, within the meaning of the constitution, it must be uniform.

If it can be considered as a tax, neither direct within the meaning of the constitution, nor comprehended within the term duty, impost, or excise; there is no provision in the constitution, one way or another, and then it must be left to such an operation of the power, as if the authority to lay taxes had been given generally in all instances, without saying whether they should be apportioned or uniform; and in that case, I should presume, the tax ought to be uniform; because the present constitution was particularly intended to affect individuals, and not States, except in particular cases specified; and this is the leading distinction between the articles of confederation and the present constitution.

As all direct taxes must be apportioned, it is evident that the constitution contemplated none as direct but such as could be apportioned.

If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the constitution.

That this tax cannot be apportioned is evident. Suppose ten dollars contemplated as a tax on each chariot, or post chaise, in the United States, and the number of both in all the United States be computed at one hundred and five, the number of representatives in congress,—this would produce in the whole one thousand and fifty dollars; the share of Virginia, being 19-105 parts, would be one hundred and ninety dollars; the share of Connecticut, being 7-105 parts, would be seventy dollars; then suppose Virginia had fifty carriages, Connecticut two, the share of Virginia being one hundred and ninety dollars, this must of course be collected from the owners of carriages, and there would therefore be collected from each carriage three dollars and eighty cents; the share of Connecticut being seventy dollars, each carriage would pay thirty-five dollars.

If any State had no carriages, there could be no apportionment at all. This mode is too manifestly absurd to be supported, and has not even been attempted in debate. But two expedients have been proposed of a very extraordinary nature to evade the difficulty.

1. To raise the money a tax on carriages would produce, not by laying a tax on each carriage uniformly, but by selecting different articles in different States, so that the amount paid in each State may be equal to the sum due upon a principle of apportionment.

One State might pay by a tax on carraiges, another by a tax on slaves, &c.

I should have thought this merely an exercise of ingenuity, if it had not been pressed with some earnestness; and as this was done by gentlemen of high respectability in their profession, it deserves a serious answer, though it is very difficult to give such a one.

1. This is not an apportionment, of a tax on carriages, but of the money a tax on carriages might be supposed to produce, which is quite a different thing.

2. It admits that congress cannot lay an uniform tax on all carriages in the Union, in any mode, but that they may on carriages in one or more States. They may therefore lay a tax on carriages in fourteen States, but not in the fifteenth.

3. If congress, according to this new decree, may select carriages as a proper object, in one or more States, but omit them in others, I presume they may omit them in all, and select other articles.

Suppose, then, a tax on carriages would produce $100,000, and a tax on horses a like sum, $100,000, and $100,000 were to be apportioned according to that mode; gentlemen might amuse themselves with calling this a tax on carriages, or a tax on horses, while not a single carriage, nor a single horse was taxed throughout the Union.

4. Such an arbitrary method of taxing different States differently, is a suggestion altogether new, and would lead, if practised, to such dangerous consequences that it will require very powerful arguments to show that that method of taxing would be in any manner compatible with the constitution, with which at present, I deem it utterly irreconcilable, it being altogether destructive of the notion of a common interest, upon which the very principles of the constitution are founded, so far as the condition of the United States will admit.

The second expedient proposed was, that of taxing carriages, among other things, in a general assessment. This amounts to saying that congress may lay a tax on carriages, but that they may not do it unless they blend it with other subjects of taxation. For this, no reason or authority has been given, and in addition to other suggestions offered by the counsel on that side, affords an irrefragable proof, that when positions plainly so untenable are offered to counteract the principle contended for by the opposite counsel, the principle itself is a right one; for, no one can doubt, that if better reasons could have been offered, they would not have escaped the sagacity and learning of the gentlemen who offered them.

There is no necessity or propriety in determining what is, or is not a direct or indirect tax in all cases.

Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil, something capable of apportionment under all such circumstances.

A land or a poll tax may be considered of this description.

The latter is to be considered so particularly under the present constitution, on account of the slaves in the southern States, who give a ratio in the representation in the proportion of three to five.

Either of these is capable of apportionment. In regard to other articles, there may possibly be considerable doubt.

It is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax contemplated by the constitution, in order to affirm the present judgment; since, if it cannot be apportioned, it must necessarily be uniform.

I am clearly of opinion this is not a direct tax in the sense of the constitution, and, therefore, that the judgment ought to be affirmed.

[WILSON, J., had rendered an opinion in this case in the Circuit Court of Virginia, and now merely expressed his concurrence in the opinion of the court. CUSHING, J., not having heard the arguments, did not deliver an opinion.]

BY THE COURT. Let the judgment of the circuit court be affirmed.

McCULLOCH v. THE STATE OF MARYLAND ET AL.

4 Wheaton, 316. Decided 1819.

ERROR to the court of appeals of the State of Maryland. . . .

[In April, 1816, Congress incorporated the Bank of the United States. In February, 1818, the general assembly of Maryland imposed "a tax on all banks, or branches thereof, in the State of Maryland, not chartered by the legislature." McCulloch, the cashier of the branch of the Bank of the United States established in the city of Baltimore, violated the latter act by issuing notes upon unstamped paper. The question submitted to the court for their decision in this case is as to the validity of the said act of the

general assembly of Maryland, on the ground of its being repugnant to the constitution of the United States, and the act of congress aforesaid, or one of them.]

MARSHALL, C. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union; and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, has congress power to incorporate a bank? . . .

[This part of the opinion is given infra, page 308.]

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:—

2. Whether the State of Maryland may, without violating the constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a State from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as

it certainly may restrain, a State from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve. 3. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed.

The power of congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by, the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat

the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution.

The argument on the part of the State of Maryland, is, not that the States may directly resist a law of congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject it to the test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the States. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the States. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object brought within its jurisdiction.

This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive

with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power, which the people of a single State cannot give.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the in-

quiry, whether this power can be exercised by the respective States, consistently with a fair construction of the constitution?

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the State.

If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; the may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.

Gentlemen say, they do not claim the right to extend State

taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the 10th section of the 1st article of the constitution; that, with respect to everything else, the power of the States is supreme, and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the States be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the course of the argument, the Federalist has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and, to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers, from which passages have been cited, is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the argument seeks to remove, is stated with fullness and clearness. It is "that an indefinite power of taxation in the latter (the government of the Union) might, and probably would, in time, deprive the former (the government of the States) of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might at any time abolish the taxes imposed for State objects, upon the pretense of an interference with its own.

It might allege a necessity for doing this, in order to give efficacy to the national revenues; and thus all the resources of taxation might, by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments."

The objections to the constitution which are noticed in these numbers, were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from State taxation. The consequences apprehended from this undefined power were, that it would absorb all the objects of taxation, "to the exclusion and destruction of the state governments." The arguments of the Federalist are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of State taxation. Arguments urged against these objections, and these apprehensions, are to be understood as relating to the points they mean to prove. Had the authors of those excellent essays been asked, whether they contended for that construction of the constitution, which would place within the reach of the States those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative.

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the States, will equally sustain the right of the States to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme,

and those of a government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of congress to tax the state banks, and could not prove the right of the States to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

JUDGMENT. This cause came on to be heard on the transcript of the record of the court of appeals of the State of Maryland, and was argued by counsel. On consideration whereof, it is the opinion of this court that the act of the legislature of Maryland is contrary to the constitution of the United States, and void.

* * *

NOTE.—"A case could not be selected from the decisions of the Supreme Court of the United States, superior to this one of McCulloch v. Maryland, for the clear and satisfactory manner in which the supremacy of the laws of the Union have been maintained by the court, and an undue assertion of State power overruled and defeated." Kent's Commentaries, I., 428.

WESTON ET AL. v. THE CITY COUNCIL OF CHARLESTON.

2 Peters, 449. Decided 1829.

Error to the constitutional court of South Carolina. By an ordinance of the city of Charleston, "stock of the United States" was, among other things, made taxable. The plaintiffs, as owners of such stock, applied to the court of common pleas of the Charleston district for a prohibition to restrain the city council from taxing that stock, on the ground that the tax would be inconsistent with the constitution of the United States. The prohibition having been granted, the proceedings were removed into the constitutional court, where four of the seven judges being of opinion that the tax would be valid, reversed the order for a prohibition, and thereupon this writ of error was brought. . . .

MARSHALL, C. J., delivered the opinion of the court. . . .

. . . This brings us to the main question. Is the stock issued for loans made to the government of the United States liable to be taxed by States and corporations?

Congress has power "to borrow money on the credit of the United States." The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract.

If the States and corporations throughout the Union, possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

But it is unnecessary to pursue this principle through its diversified application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic. In war, when the honor, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the

abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, "to borrow money on the credit of the United States." Can anything be more dangerous, or more injurious, than the admission of a principle which authorizes every State and every corporation in the Union which possesses the right of taxation, to burden the exercise of this power at their discretion?

If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burdened, impeded, if not arrested, by any of the organized parts of the confederacy.

In a society formed like ours, with one supreme government for national purposes, and numerous state governments for other purposes, in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a State, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise, is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once devolved on this court. In the performance of it we have considered it as a necessary consequence from the supremacy of the government of the whole, that its action in the exercise of its legitimate powers, should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a State cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the States united may rightfully adopt.

This subject was brought before the court in the case of McCulloch v. The State of Maryland, 4 Wheaton, 316, when it was thoroughly argued and deliberately considered. The question decided in that case bears a near resemblance to that which is involved in this. It was discussed at the bar in all its relations,

and examined by the court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed, but that conclusion was that "all subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are upon the soundest principles exempt from taxation." "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission;" but not "to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States." "The attempt to use" the power of taxation "on the means employed by the government of the Union in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give."

The court said in that case, that "the States have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by congress, to carry into execution the powers vested in the general government."

We retain the opinions which were then expressed. A contract made by the government in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any State in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created. It ought, therefore, on the principles settled in the case of McCulloch v. The State of Maryland, to be exempt from state taxation, and consequently from being taxed by corporations deriving their power from States.

It is admitted that the power of the government to borrow money cannot be directly opposed, and that any law directly obstructing its operation would be void; but a distinction is taken between direct opposition and those measures which may consequentially affect it; that is, that a law prohibiting loans to the United States would be void, but a tax on them to any amount is allowable.

It is, we think, impossible not to perceive the intimate connection which exists between these two modes of acting on the subject.

It is not the want of original power in an independent sovereign State, to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our constitution. The Amer-

ican people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.

The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderate, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

It is admitted by the counsel for the defendants, that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States.

The distinction is, we think, apparent. When lands are sold, no connection remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may then assume is not questioned. The connection between the borrower and the lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government, stands, we think, on very different principles from a tax on lands which the government has sold.

"The Federalist" has been quoted in the argument, and an eloquent and well-merited eulogy has been bestowed on the great statesman who is supposed to be the author of the number from which the quotation was made. This high authority was also relied upon in the case of McCulloch v. The State of Maryland, and was considered by the court. Without repeating what was then said, we refer to it as exhibiting our view of the sentiments expressed on this subject by the authors of that work.

It has been supposed that a tax on stock comes within the

exceptions stated in the case of McCulloch v. The State of Maryland. We do not think so. The bank of the United States is an instrument essential to the fiscal operations of the government, and the power which might be exercised to its destruction was denied. But property acquired by that corporation in a State was supposed to be placed in the same condition with property acquired by an individual.

The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the constitution.

We are, therefore, of opinion that the judgment of the constitutional court of the State of South Carolina, reversing the order made by the court of common pleas, awarding a prohibition to the city council of Charleston, to restrain them from levying a tax imposed on six and seven per cent. stock of the United States, under an ordinance to raise supplies to the use of the city of Charleston for the year 1823, is erroneous in this; that the said constitutional court adjudged that the said ordinance was not repugnant to the constitution of the United States; whereas, this court is of opinion that such repugnancy does exist. We are, therefore, of opinion that the said judgment ought to be reversed and annulled, and the cause remanded to the constitutional court for the State of South Carolina, that further proceedings may be had therein according to law.

[JUSTICES JOHNSON and THOMPSON delivered dissenting opinions.]

LICENSE TAX CASES.

5 Wallace, 462. Decided 1866.

[By the internal revenue act of 1864, subsequently amended, Congress enacted that all persons intending to engage in certain occupations, including the selling of lottery tickets and the retailing of liquors, should first obtain a license from the United States. (See 13 Stat. at Large, 248, 249, 252, 472, 485; 14 Id., 113, 116, 137, 301.)

In New York and New Jersey, the selling of lottery tickets, and in Massachusetts, the retailing of liquors (except in certain specified cases), were strictly forbidden.

In this condition of statute law, national and State, seven cases were brought before the Supreme Court. All of them arose under the provisions of the internal revenue acts relating to licenses for selling liquors and dealing in lotteries, and to special taxes on the latter business.

In five of the cases the general question was: Can the defendants be equally convicted upon the several indictments found against them for not having complied with the acts of Congress by taking out and paying for the required licenses to carry on the business in which they were engaged, such business being wholly prohibited by the laws of the several States in which it was carried on?

In the other two cases the general question was: Could the defendants be legally convicted upon an indictment for being engaged in a business on which a special tax is imposed by acts of Congress, without having paid such a special tax, notwithstanding that such business was, and is wholly prohibited by the laws of New York?]

The CHIEF JUSTICE, having stated the case, delivered the opinion of the court.

In the argument of all the cases here before the court, it was strenuously maintained by counsel for the defendants that the imposition of penalties for carrying on any business prohibited by State laws, without payment for the license or special tax required by Congress, is contrary to public policy. . . . This court can know nothing of public policy except from the Constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here. . . .

We come now to examine a more serious objection to the legislation of Congress in relation to the dealings in controversy. It was argued for the defendants in error that a license to carry on a particular business gives an authority to carry it on; that the dealings in controversy were parcel of the internal trade of the State in which the defendants resided; that the internal trade of a State is not subject, in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under acts of Congress, must therefore be absolutely null and void; and, consequently, that penalties for

carrying on such trade without such license could not be constitutionally imposed.

This series of propositions, and the conclusion in which it terminates, depends on the postulate that a license necessarily confers an authority to carry on the licensed business. But do the licenses required by the acts of Congress for selling liquor and lottery tickets confer any authority whatever?

It is not doubted that where Congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee authority to do whatever is authorized by its terms.

Thus, Congress having power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, may, without doubt, provide for granting coasting licenses, licenses to pilots, licenses to trade with the Indians, and any other licenses necessary or proper for the exercise of that great and extensive power; and the same observation is applicable to every other power of Congress, to the exercise of which the granting of licenses may be incident. All such licenses confer authority, and give rights to the licensee.

But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject. It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion. But it reaches only existing subjects. Congress cannot authorize a trade or business within a State in order to tax it.

If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution.

But it is not necessary to regard these laws as giving such author-

ity. So far as they relate to trade within State limits, they give none, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it.

This construction is warranted by the practice of the government from its organization. As early as 1794 retail dealers in wines or in foreign distilled liquors were required to obtain and pay for licenses, and renew them annually, and penalties were imposed for carrying on the business without compliance with the law.[1] In 1802 these license-taxes and the other excise or internal taxes, which had been imposed under the exigencies of the time, being no longer needed, were abolished.[2] In 1813 revenue from excise was again required, and laws were enacted for the licensing of retail dealers in foreign merchandise, as well as to retail dealers in wines and various descriptions of liquors.[3] These taxes also were abolished after the necessity for them had passed away, in 1817.[4] No claim was ever made that the licenses thus required gave authority to exercise trade or carry on business within a State. They were regarded merely as a convenient mode of imposing taxes on several descriptions of business, and of ascertaining the parties from whom such taxes were to be collected.

With this course of legislation in view, we cannot say that there is anything contrary to the Constitution in these provisions of the recent or existing internal revenue acts relating to licenses.

Nor are we able to perceive the force of the other objection made in argument, that the dealings for which licenses are required being prohibited by the laws of the State, cannot be taxed by the National government. There would be great force in it if the licenses were regarded as giving authority, for then there would be a direct conflict between National and State legislation on a subject which the Constitution places under the exclusive control of the States.

But, as we have already said, these licenses give no authority. They are mere receipts for taxes. And this would be true had the internal revenue act of 1864, like those of 1794 and 1813, been

[1] 1 Stat. at Large, 377.
[2] Id., 148.
[3] 3 Id., 72.
[4] Id., 401.

silent on this head. But it was not silent. It expressly provided, in section sixty-seven, that no license provided for in it should, if granted, be construed to authorize any business with any State or Territory prohibited by the laws thereof, or so as to prevent the taxation of the same business by the State. This provision not only recognizes the full control by the State of business carried on within their limits, but extends the same principle, so far as such business licensed by the national government is concerned, to the Territories.

There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

These considerations require an affirmative answer to the first general question, whether the several defendants, charged with carrying on business prohibited by State laws, without the licenses required by acts of Congress can be convicted and condemned to pay the penalties imposed by these acts? . . .

CRANDALL v. STATE OF NEVADA.

6 Wallace, 35. Decided 1867.

Error to the Supreme Court of Nevada.

In 1865, the legislature of Nevada enacted that "there shall be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage-coach, or other vehicle engaged or employed in the business of transporting passengers for hire," and that the proprietors, owners, and corporations so engaged should pay the said tax of one dollar for each and every person so conveyed or transported from the State. For the purpose of collecting the tax, another section required from persons engaged in such business, or their agents, a report every month, under oath, of the number of passengers so transported, and the payment of the tax to the sheriff or other proper officer.

With the statute in existence, Crandall, who was the agent of a

stage company engaged in carrying passengers through the State of Nevada, was arrested for refusing to report the number of passengers that had been carried by the coaches of his company, and for refusing to pay the tax of one dollar imposed on each passenger by the law of that State. He pleaded that the law of the State under which he was prosecuted was void, because it was in conflict with the Constitution of the United States; and his plea being overruled, the case came into the Supreme Court of the State. That court—considering that the tax laid was not an impost on "exports," nor an interference with the power of Congress "to regulate commerce among the several States"—decided against the right thus set up under the Federal Constitution. Its judgment was now here for review. . . .

Mr. Justice Miller delivered the opinion of the court.

The question for the first time presented to the court by this record is one of importance. The proposition to be considered is the right of a State to levy a tax upon persons residing in the State who may wish to get out of it, and upon persons not residing in it who may have occasion to pass through it.

It is to be regretted that such a question should be submitted to our consideration, with neither brief nor argument on the part of plaintiff in error. But our regret is diminished by the reflection, that the principles which must govern its determination have been the subject of much consideration in cases heretofore decided by this court.

It is claimed by counsel for the State that the tax thus levied is not a tax upon the passenger, but upon the business of the carrier who transports him.

If the act were much more skillfully drawn to sustain this hypothesis than it is, we should be very reluctant to admit that any form of words, which had the effect to compel every person traveling through the country by the common and usual modes of public conveyance to pay a specific sum to the State, was not a tax upon the right thus exercised. The statute before us is not, however, embarrassed by any nice difficulties of this character. The language which we have just quoted is, that there shall be levied and collected a capitation tax upon every person leaving the State by any railroad or stage-coach; and the remaining provisions of the act, which refer to this tax, only provide a mode of collecting it. The officers and agents of the railroad companies, and the proprietors of the stage-coaches are made responsible for this, and so become the collectors of the tax.

We shall have occasion to refer hereafter somewhat in detail, to the opinions of the judges of this court in The Passenger Cases,[1] in which there were wide differences on several points involved in the case before us. In the case from New York then under consideration, the statute provided that the health commissioner should be entitled to demand and receive from the master of every vessel that should arrive in the port of New York, from a foreign port, one dollar and fifty cents for every cabin passenger, and one dollar for each steerage passenger, and from each coasting vessel, twenty-five cents for every person on board. That statute does not use language so strong as the Nevada statute, indicative of a personal tax on the passenger, but merely taxes the master of the vessel according to the number of his passengers; but the court held it to be a tax upon the passenger, and that the master was the agent of the State for its collection. Chief Justice Taney, while he differed from the majority of the court, and held the law to be valid, said of the tax levied by the analogous statute of Massachusetts, that "its payment is the condition upon which the State permits the alien passenger to come on shore and mingle with its citizens, and to reside among them. It is demanded of the captain; and not from every separate passenger, for convenience of collection. But the burden evidently falls upon the passenger, and he, in fact, pays it, either in the enhanced price of his passage or directly to the captain before he is allowed to embark for the voyage. The nature of the transaction, and the ordinary course of business, show that this must be so."

Having determined that the statute of Nevada imposes a tax upon the passenger for the privilege of leaving the State, or passing through it by the ordinary mode of passenger travel, we proceed to inquire if it is for that reason in conflict with the Constitution of the United States.

In the argument of the counsel for the defendant in error, and in the opinion of the Supreme Court of Nevada, which is found in the record, it is assumed that this question must be decided by an exclusive reference to two provisions of the Constitution, namely: that which forbids any State, without the consent of Congress, to lay any imposts or duties on imports or exports, and that which confers on Congress the power to regulate commerce with foreign nations and among the several States.

The question as thus narrowed is not free from difficulties. Can a citizen of the United States traveling from one part of the Union

[1] 7 Howard, 283.

to another be called an export? It was insisted in The Passenger Cases, to which we have already referred, that foreigners coming to this country were imports within the meaning of the Constitution, and the provision of that instrument that the migration or importation of such persons as any of the States then existing should think proper to admit, should not be prohibited prior to the year 1808, but that a tax might be imposed on such importation, was relied on as showing that the word import, applied to persons as well as to merchandise. It was answered that this latter clause had exclusive reference to slaves, who were property as well as persons, and therefore proved nothing. While some of the judges who concurred in holding those laws unconstitutional, gave as one of their reasons that they were taxes on imports, it is evident that this view did not receive the assent of the majority of the court. The application of this provision of the Constitution to the proposition which we have stated in regard to the citizen, is still less satisfactory than it would be to the case of foreigners migrating to the United States.

But it is unnecessary to consider this point further in the view which we have taken of the case.

As regards the commerce clause of the Constitution, two propositions are advanced on behalf of the defendant in error. 1. That the tax imposed by the State on passengers is not a regulation of commerce. 2. That if it can be so considered, it is one of the powers which the State can exercise, until Congress has so legislated as to indicate its intention to exclude State legislation on the same subject.

The proposition that the power to regulate commerce, as granted to Congress by the Constitution, necessarily excludes the exercise by the States of any of the powers thus granted, is one which has been much considered in this court, and the earlier discussions left the question in much doubt. As late as the January Term, 1849, the opinions of the judges in The Passenger Cases show that the question was considered to be one of much importance in those cases, and was even then unsettled, though previous decisions of the court were relied on by the judges themselves as deciding it in different ways. It was certainly, so far as those cases affected it, left an open question.

In the case of Cooley v. Board of Wardens,[1] four years later, the same question came directly before the court in reference to the local laws of the port of Philadelphia concerning pilots.

[1] 12 Howard, 299.

. . . Perhaps no more satisfactory solution has ever been given of this vexed question than the one furnished by the court in that case. . . .

It may be that under the power to regulate commerce among the States, Congress has authority to pass laws, the operation of which would be inconsistent with the tax imposed by the State of Nevada, but we know of no such statute now in existence. Inasmuch, therefore, as the tax does not itself institute any regulation of commerce of a national character, or which has a uniform operation over the whole country, it is not easy to maintain, in view of the principles on which those cases are decided, that it violates the clause of the Federal Constitution which we have had under review.

But we do not concede that the question before us is to be determined by the two clauses of the Constitution which we have been examining.

The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. Here sits its legislature, composed of senators and representatives, from the States and from the people of the States. Here resides the President, directing, through thousands of agents, the execution of the laws over all this vast country. Here is the seat of the supreme judicial power of the nation, to which all its citizens have a right to resort to claim justice at its hands. Here are the great executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations. These are all established and conducted under the admitted powers of the Federal government. That government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered. The government also, has its offices of secondary importance in all other parts of the country. On the sea-coasts and on the rivers it has its ports of entry. In the interior it has its land offices, its revenue offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct

this right that would not enable it to defeat the purposes for which the government was established.

The Federal power has a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any State of the Union.

If this right is dependent in any sense, however limited, upon the pleasure of a State, the government itself may be overthrown by an obstruction to its exercise. Much the largest part of the transportation of troops during the late rebellion was by railroads, and largely through States whose people were hostile to the Union. If the tax levied by Nevada on railroad passengers had been the law of Tennessee, enlarged to meet the wishes of her people, the treasury of the United States could not have paid the tax necessary to enable its armies to pass through her territory.

But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.

The views here advanced are neither novel nor unsupported by authority. The question of the taxing power of the States, as its exercise has affected the functions of the Federal government, has been repeatedly considered by this court, and the right of the States in this mode to impede or embarrass the constitutional operations of that government, or the rights which its citizens hold under it, has been uniformly denied. . . . [Here follows a discussion of McCulloch v. Md., 4 Wheat.., 316; Brown v. Md., 12 Wheat., 419; Weston v. Charleston, 2 Pet., 449.]

In all these cases, the opponents of the taxes levied by the States were able to place their opposition on no express provision of the Constitution, except in that of Brown v. Maryland. But in all the other cases, and in that case also, the court distinctly placed the invalidity of the State taxes on the ground that they interfered with an authority of the Federal government, which was itself only to be sustained as necessary and proper to the exercise of some other power expressly granted.

In The Passenger Cases, to which reference has already been

made, Justice Grier, with whom Justice Catron concurred, makes this one of the four propositions on which they held the tax void in those cases. Judge Wayne expresses his dissent to Judge Grier's views; and perhaps this ground received the concurrence of more of the members of the court who constituted the majority than any other. But the principles here laid down may be found more clearly stated in the dissenting opinion of the Chief Justice in those cases, and with more direct pertinency to the case now before us than anywhere else. After expressing his views fully in favor of the validity of the tax, which he said had exclusive reference to foreigners, so far as those cases were concerned, he proceeds to say, for the purpose of preventing misapprehension, that so far as the tax affected American citizens it could not in his opinion be maintained. He then adds: "Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States from the most remote States or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals, and public offices in every State in the Union. . . . For all the great purposes for which the Federal government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State, for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it."

Although these remarks are found in a dissenting opinion, they do not relate to the matter on which the dissent was founded. They accord with the inferences which we have already drawn from the Constitution itself, and from the decisions of this court in exposition of that instrument.

Those principles, as we have already stated them in this opinion, must govern the present case. . . .

Judgment reversed, and the case remanded to the Supreme Court of the State of Nevada, with directions to discharge the plaintiff in error from custody.

VEAZIE BANK v. FENNO.

8 Wallace, 533. Decided 1869.

ON certificate of division for the Circuit Court for Maine.

The Constitution ordains that:

"The Congress shall have power—

"To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

"To coin money, regulate the value thereof, and of foreign coin."

It also ordains that:

"Direct taxes shall be apportioned among the several States . . . according to their respective numbers."

"No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be made."

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

With these provisions in force as fundamental law, Congress passed, July 13th, 1866,[1] an act, the second clause of the 9th section of which enacts:

"That every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association, used for circulation and paid out by them after the 1st day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the commissioner of internal revenue."

Under this act a tax of ten per cent. was assessed upon the Veazie Bank, for its bank notes issued for circulation, after the day named in the act.

The Veazie Bank was a corporation chartered by the State of Maine, with authority to issue bank notes for circulation, and the notes on which the tax imposed by the act was collected, were issued under this authority. There was nothing in the case show-

[1] 14 Stat. at Large, 146.

ing that the bank sustained any relation to the State as a financial agent, or that its authority to issue notes was conferred or exercised with any special reference to other than private interests.

The bank declined to pay the tax, alleging it to be unconstitutional, and the collector of internal revenue, one Fenno, was proceeding to make a distraint in order to collect it, with penalty and costs, when, in order to prevent this, the bank paid it under protest. An unsuccessful claim having been made on the commissioner of internal revenue for reimbursement, suit was brought by the bank against the collector, in the court below.

The case was presented to that court upon an agreed statement of facts, and, upon a prayer for instructions to the jury, the judges found themselves opposed in opinion on three questions, the first of which—the two others differing from it in form only, and not needing to be recited—was this:

"Whether the second clause of the 9th section of the act of Congress of the 13th of July, 1866, under which the tax in this case was levied and collected, is a valid and constitutional law."

. . .

The CHIEF JUSTICE delivered the opinion of the court.

The necessity of adequate provision for the financial exigencies created by the late rebellion, suggested to the administrative and legislative departments of the government important changes in the systems of currency and taxation which had hitherto prevailed. These changes, more or less distinctly shown in administrative recommendations, took form and substance in legislative acts. We have now to consider, within a limited range, those which relate to circulating notes and the taxation of circulation.

At the beginning of the rebellion the circulating medium consisted almost entirely of bank notes issued by numerous independent corporations variously organized under State legislation, of various degrees of credit, and very unequal resources, administered often with great, and not unfrequently, with little skill, prudence, and integrity. The acts of Congress, then in force, prohibiting the receipt or disbursement, in the transactions of the National government, of anything except gold and silver, and the laws of the States requiring the redemption of bank notes in coin on demand, prevented the disappearance of gold and silver from circulation. There was, then, NO national currency except coin; there was no general[2] regulation of any other by National legisla-

[2] See the act of December 27th, 1854, to suppress small notes in the District of Columbia, 10 Stat. at Large, 599.

tion; and no national taxation was imposed in any form on the State bank circulation.

The first act authorizing the emission of notes by the Treasury Department for circulation was that of July 17th, 1861.[2] The notes issued under this act were treasury notes, payable on demand in coin. The amount authorized by it was $50,000,000, and was increased by the act of February 12th, 1862[3] to $60,000,000.

On the 31st of December, 1861, the State banks suspended specie payment. Until this time the expenses of the war had been paid in coin, or in the demand notes just referred to; and for some time afterwards, they continued to be paid in these notes, which, if not redeemed in coin, were received as coin in the payment of duties.

Subsequently, on the 25th day of February, 1862,[4] a new policy became necessary in consequence of the suspension and of the condition of the country, and was adopted. The notes hitherto issued, as has just been stated, were called treasury notes, and were payable on demand in coin. The act now passed authorized the issue of bills for circulation under the name of United States notes, made payable to bearer, but not expressed to be payable on demand, to the amount of $150,000,000; and this amount was increased by subsequent acts to $450,000,000, of which $50,000,000 were to be held in reserve, and only to be issued for a special purpose, and under special directions as to the withdrawal from circulation.[5] These notes, until after the close of the war, were always convertible into, or receivable at par for bonds payable in coin, and bearing coin interest, at a rate not less than five per cent, and the acts by which they were authorized, declared them to be lawful money and a legal tender.

This currency, issued directly by the government for the disbursement of the war and other expenditures, could not, obviously, be a proper object of taxation.

But on the 25th of February, 1863, the act authorizing National banking associations[6] was passed, in which, for the first time during many years, Congress recognized the expediency and duty of imposing a tax upon currency. By this act a tax of two per cent annually was imposed on the circulation of the associations authorized by it. Soon after, by the act of March 3d, 1863,[7] a similar but lighter tax of one per cent annually was imposed on

[2] 12 Stat. at Large, 259.
[3] Ib., 338.
[4] Ib., 345.
[5] Act of July 11th, 1862, Ib., 532; Act of March 3d, 1863, Ib., 710.
[6] Act of March 3d, 1863, 12 Ib., 670.
[7] Ib., 712.

the circulation of State banks in certain proportions to their capital, and of two per cent. on the excess; and the tax on the National associations was reduced to the same rates.

Both acts also imposed taxes on capital and deposits, which need not be noticed here.

At a later date, by the act of June 3d, 1864,[8] which was substituted for the act of February 25th, 1863, authorizing National banking associations, the rate of tax on circulation was continued and applied to the whole amount of it, and the shares of their stockholders were also subjected to taxation by the States; and a few days afterwards, by the act of June 30th, 1864,[9] to provide ways and means for the support of the government, the tax on the circulation of the State banks was also continued at the same annual rate of one per cent., as before, but payment was required in monthly installments of one-twelfth of one per cent., with monthly reports from each State bank of the amount in circulation.

It can hardly be doubted that the object of this provision was to inform the proper authorities of the exact amount of paper money in circulation, with a view to its regulation by law.

The first step taken by Congress in that direction was by the act of July 17, 1862,[10] prohibiting the issue and circulation of notes under one dollar by any person or corporation. The act just referred to was the next, and it was followed some months later by the act of March 3d, 1865, amendatory of the prior internal revenue acts, the sixth section of which provides, "that every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of the notes of any State bank, or State banking association, paid out by them after the 1st day of July, 1866.[11]

The same provision was re-enacted, with a more extended application, on the 13th of July, 1866, in these words: "Every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association used for circulation, and paid out by them after the first day of August, 1866; and such tax shall be assessed and paid in such manner as shall be prescribed by the Commissioner of Internal Revenue."[12]

The constitutionality of this last provision is now drawn in question, and this brief statement of the recent legislation of Congress

[8] 13 Ib., 111.
[9] Ib., 277.
[10] Act of March 3d, 1863, 12 Ib., 592.
[11] 13 Ib., 484.
[12] 14 Ib., 146.

has been made for the purpose of placing in a clear light its scope and bearing, especially as developed in the provisions just cited. It will be seen that when the policy of taxing bank circulation was first adopted in 1863, Congress was inclined to discriminate for, rather than against, the circulation of the State banks; but that when the country had been sufficiently furnished with a National currency by the issues of United States notes and of National bank notes, the discrimination was turned, and very decidedly turned, in the opposite direction.

The general question now before us is, whether or not the tax of ten per cent., imposed on State banks or National banks paying out the notes of individuals or State banks used for circulation, is repugnant to the Constitution of the United States.

In support of the position that the act of Congress, so far as it provides for the levy and collection of this tax, is repugnant to the Constitution, two propositions have been argued with much force and earnestness.

The first is that the tax in question is a direct tax, and has not been apportioned among the States agreeably to the Constitution.

The second is that the act imposing the tax impairs a franchise granted by the State, and that Congress has no power to pass any law with that intent or effect.

The first of these propositions will be first examined. . . .

Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with little reference to their speculations. . . . We are obliged therefore to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority. And considered in this light, the meaning and application of the rule, as to direct taxes, appears to us quite clear. It is, as we think, distinctly shown in every act of Congress on the subject.

In each of these acts, a gross sum was laid upon the United States, and the total amount was apportioned to the several States, according to their respective numbers of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the act, fixing its total sum. . . . In each instance, the total sum was apportioned among the States, by the constitu-

tional rule, and was assessed at prescribed rates, on the subjects of the tax. These subjects, in 1798,[1] 1813,[2] 1815,[3] 1816,[4] were lands, improvements, dwelling-houses, and slaves; and in 1861, lands, improvements, and dwelling-houses only. Under the act of 1798, slaves were assessed at fifty cents on each; under the other acts, according to valuation by assessors. This review shows that personal property, contracts, occupations, and the like, have never been regarded by Congress as proper subjects of direct tax. . . .

[After a discussion of Hylton v. U. S., the court continues:]

It may be safely assumed, therefore, as the unanimous judgment of the court, that a tax on carriages is not a direct tax. And it may further be taken as established upon the testimony of Paterson, that the words direct taxes, as used in the Constitution, comprehended only capitation taxes, and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States.

It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of Pacific Insurance Company v. Soule,[5] held not to be a direct tax.

Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect? We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive prop-

[1] Act of July 9th, 1798, 1 Stat. at Large, 586.
[2] Act of July 22d, 1813, 3 Ib., 26.
[3] Id., 166.
[4] Id., 255.
[5] 7 Wallace, 434.

erty; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue.

It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

But there is another answer which vindicates equally the wisdom and the power of Congress.

It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here, to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say, that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency,

uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country.

The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the National banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are issued on the credit of the government; and the government is responsible for the redemption of both; primarily as to the first description, and immediately upon default of the bank, as to the second. When these bills shall be made convertible into coin, at the will of the holder, this currency will, perhaps, satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised.

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration. The three questions certified from the Circuit Court of the District of Maine must, therefore, be answered *Affirmatively.*

[Mr Justice Nelson rendered a dissenting opinion, in which Justice Davis concurred.]

THE COLLECTOR v. DAY.

11 Wallace, 113. Decided 1870.

ERROR to the Circuit Court for the District of Massachusetts.

. . .

[The case grew out of an attempt of a collector of the internal revenue of the United States to collect a tax on the salary of a judge of the State of Massachusetts levied in accordance with certain acts of Congress passed in 1864, '65, '66, and '67.]

MR. JUSTICE NELSON delivered the opinion of the court.

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State?

In Dobbins v. The Commissioners of Erie County,[1] it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the States, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt.

The cases of McCulloch v. Maryland,[2] and Weston v. Charleston,[3] were referred to as settling the principle that governed the case, namely, "that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers." . . . [Here follow citations from these cases.]

It is conceded in the case of McCulloch v. Maryland, that the power of taxation by the States was not abridged by the grant of a similar power to the government of the Union; that it was retained by the States, and that the power is to be concurrently exercised by the two governments; and also that there is no express constitutional prohibition upon the States against taxing the means or instrumentalities of the general government. But it was

[1] 16 Peters, 435.
[2] 4 Wheaton, 316.
[3] 2 Peters, 449.

held, and we agree properly held, to be prohibited by necessary implication; otherwise, the States might impose taxation to an extent that would impair, if not wholly defeat, the operations of the Federal authorities when acting in their appropriate sphere.

These views, we think, abundantly establish the soundness of the decision of the case of Dobbins v. The Commissioners of Erie, which determined that the States were prohibited, upon a proper construction of the Constitution, from taxing the salary or emoluments of an officer of the government of the United States. And we shall now proceed to show that, upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of the judicial officer of a State.

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the Tenth Article of the amendments, namely: "The powers not delegated to the United States are reserved to the States respectively, or, to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States.

The relations existing between the two governments are well stated by the present Chief Justice in the case of Lane County v. Oregon, 7 Wallace, 76. "Both the States and the United States," he observed, "existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a national government, acting with ample powers directly upon the citizens, instead of the Confederate government, which acted with powers greatly restricted, only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the inde-

pendent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the national government, are reserved." Upon looking into the Constitution, it will be found that but few of the articles in that instrument could be carried into practical effect without the existence of the States.

Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated, by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States.

The supremacy of the general government, therefore, so much

relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the general government to tax the salary of a judicial officer of the State, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the States?

We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the general government from levying the tax, as that depends upon the express power "to lay and collect taxes," but it shows that it is an original inherent power never parted with, and, in respect to which, the supremacy of that government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government stand upon as solid a ground, and are maintained by principles and reasons as cogent, as those which led to the exemption of the Federal officer in Dobbins v. The Commisisoners of Erie from taxation by the State; for, in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

But we are referred to the Veazie Bank v. Fenno, 8 Wallace, 533, in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in McCulloch v. Maryland, namely, "That the power to tax involves the power to destroy."

The power involved was one which had been exercised by the States since the foundation of the government, and had been, after the lapse of three-quarters of a century, annihilated from excessive taxation by the general government, just as the judicial office in the present case might be, if subject at all to taxation by that government. But, notwithstanding the sanction of this taxation by a majority of the court, it is conceded, in the opinion, that "the reserved rights of the States, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress." This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain.

Judgment affirmed.

Mr. Justice Bradley, dissenting.

I dissent from the opinion of the court in this case, because it seems to me that the general government has the same power of taxing the income of officers of the State governments as it has of taxing that of its own officers. It is the common government of all alike; and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the State government. I cannot accede to the doctrine that the general government is to be regarded as in any sense foreign or antagonistic to the State governments, their officers, or people; nor can I agree that a presumption can be admitted that the general government will act in a manner hostile to the existence or functions of the State governments, which are constituent parts of the system or body politic forming the basis on which the general government is founded. The taxation by the State governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation. In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult to control. Where are we to stop in

enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporate a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as any one can be to any interference by the general government with the just powers of the State governments. But no concession of any of the just powers of the general government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made. An extended discussion of the subject would answer no useful purpose.

STATE TONNAGE TAX CASES.

12 Wallace, 204. Decided 1870.

ERROR to the Supreme Court of Alabama.

These were two cases, which, though coming in different forms, involved one and the same point only; and at the bar—where the counsel directed attention to the principle involved, separated from the accidents of the case—were discussed together as presenting "precisely the same question." The matter was thus:—

The Constitution ordains that "no State shall without the consent of Congress lay any duty of tonnage." With this provision in force as superior law, the State of Alabama passed, on the 22d of February, 1866, a revenue law. By this law, the rate of taxation for property generally was the one-half of one per cent; but "on all steamboats, vessels, and other water crafts plying in the navigable waters of the State," the act levied a tax at "the rate of $1 per ton of the registered tonnage thereof," which it declared should "be assessed and collected at the port where such vessels are registered, if practicable; otherwise at any other port or landing within the State where such vessel may be."

The tax collector was directed by the act to demand, in each year, of the person in charge of the vessel, if the taxes had been paid. If a receipt for the same was not produced, he was to immediately

assess the same according to tonnage, and if such tax was not paid on demand he was to seize the boat, &c., and, after notice, proceed and sell the same for payment of the tax, &c., and pay the surplus into the county treasury for the use of the owner. If the vessel could not be seized, the collector was to make the amount of the tax out of the real and personal estate of the owner, &c.

Under this act, one Lott, tax collector of the State of Alabama, demanded of Cox, the owner of the Dorrance, a steamer of 321 tons, and valued at $5,000, and of several other steamers, certain sums as taxes; and under an act of 1867, identical in language with the one of 1866, just quoted, demanded from the Trade Company of Mobile certain sums on like vessels owned by them; the tax in all the cases being proportioned to the registered tonnage of the vessel.

The steamboats, the subject of the tax, were owned exclusively by citizens of the State of Alabama, and were engaged in the navigation of the Alabama, Bigbee, and Mobile rivers, carrying freight and passengers between Mobile and other points of said rivers, altogether within the limits of that State. These waters were navigable from the sea for vessels of "ten or more tons' burden;" and it was not denied that there were ports of delivery on them above the highest points to which these boats plied. The owners of the boats were not assessed for any other tax on them than the one here claimed. The boats were enrolled and licensed for the coasting trade. Though running, therefore, between points altogether within the limits of the State of Alabama, the boats were, as it seemed,[1] of that sort on which Congress lays a tonnage duty.

Cox, under compulsion and protest, paid the tax demanded of him, and then brought assumpsit in one of the inferior State courts of Alabama, to get back the money. The Trade Company refused to pay, and filed a bill in a like court, to enjoin the collector from proceeding to collect. The ground of resistance to the tax in each case was this, that being laid in proportion to the tonnage of the vessel, the tax was laid in a form and manner which the State was prohibited by the already quoted section of the Constitution from adopting. The right of the State to lay a tax on vessels according to their value and as property was not denied, but on the contrary conceded.[2] Judgment being given in each case against the validity

[1] See Act of July 18th, 1866, § 28; 14 Stat. at Large, 185.

[2] It is barely necessary to note that an additional ground of defense to the tax was taken, in the fact that by the act of Congress admitting Alabama into the Union, it is declared, "that all navi-

of the tax, the matter was taken to the Supreme Court of Alabama, which decided that it was lawful. To review that judgment the case was now here. . . .

MR. JUSTICE CLIFFORD delivered the judgment of the court, giving an opinion in each of the cases.

I. IN THE FIRST CASE.—. . . Congress has prescribed the rules of admeasurement and computation for estimating the tonnage of American ships and vessels.[3]

Viewed in the light of those enactments, the word tonnage, as applied to American ships and vessels, must be held to mean their entire internal cubical capacity, or contents of the ship or vessel expressed in tons of one hundred cubical feet each, as estimated and ascertained by those rules of admeasurement and of computation.[4]

Power to tax, with certain exceptions, resides with the States, independent of the Federal government, and the power, when confined within its true limits, may be exercised without restraint from any Federal authority. They cannot, however, without the consent of Congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, as without the consent of Congress they are unconditionally prohibited from exercising any such power. Outside of those prohibitions the power of the States to tax extends to all objects within the sovereign power of the States, except the means and instruments of the Federal government. But ships and vessels owned by individuals and belonging to the commercial marine are regarded as the private property of their owners, and not as the instruments or means of the Federal government, and as such, when viewed as property, they are plainly within the taxing power of the States, as they are not withdrawn from the operation of that power by any express or implied prohibition contained in the Federal Constitution.[5] . . .

gable waters within the said state shall forever remain public highways, free to the citizens of said state, and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said state." This ground not being passed upon by this court, need not be adverted to further.

[3] 13 Stat. at Large, 492, 70; Ib., 444.

[4] Nathan v. Louisiana, 8 Howard, 82; Howell v. Maryland, 3 Gill, 14.

[5] Alexander v. Railroad, 3 Strobhart, 598.

Taxes levied by a State upon ships and vessels owned by the citizens of the State as property, based on a valuation of the same as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the States from levying any duty of tonnage, without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the State which levies the tax or the citizens of another State, as the prohibition is general, withdrawing altogether from the States the power to lay any duty of tonnage under any circumstances, without the consent of Congress.[6]

Annual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question, but if the States, without the consent of Congress, tax ships or vessels as instruments of commerce, by a tonnage duty, or indirectly by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess, as every such act falls directly within the prohibition of the Constitution.[7] . . .

Tonnage duties are as much taxes as duties on imports or exports, and the prohibition of the Constitution extends as fully to such duties if levied by the States as to duties on imports or exports, and for reasons quite as strong as those which induced the framers of the Constitution to withdraw imports and exports from State taxation. Measures, however, scarcely distinguishable from each other may flow from distinct grants of power, as, for example, Congress does not possess the power to regulate the purely internal commerce of the States, but Congress may enroll and license ships and vessels to sail from one port to another in the same State; and it is clear that such ships and vessels are deemed ships and vessels of the United States, and that as such they are entitled to the privileges of ships and vessels employed in the coasting trade.[8]

. . .

Steamboats, as well as sailing ships and vessels, are required to be enrolled and licensed for the coasting trade, and the record shows that all the steamboats taxed in this case had conformed to all the regulations of Congress in that regard, that they were duly enrolled and licensed for the coasting trade and were engaged in

[6] Gibbons v. Ogden, 9 Wheaton, 202; Sennot v. Davenport, 22 Howard, 238; Foster v. Davenport, Ib., 245; Perry v. Torrence, 8 Ohio, 524.

[7] Passenger Cases, 7 Howard, 447, 481.

[8] 1 Stat. at Large, 287; Id., 305; 3 Kent (11th ed.), 203.

the transportation of passengers and freight within the limits of the State, upon waters navigable from the sea by vessels of ten or more tons burden.

Tonnage duties, to a greater or less extent, have been imposed by Congress ever since the Federal government was organized under the Constitution to the present time. They have usually been exacted when the ship or vessel entered the port, and have been collected in a manner not substantially different from that prescribed in the act of the State legislature under consideration. Undisputed authority exists in Congress to impose such duties, and it is not pretended that any consent has ever been given by Congress to the State to exercise any such power.

If the tax levied is a duty of tonnage, it is conceded that it is illegal, and it is difficult to see how the concession could be avoided, as the prohibition is express, but the attempt is made to show that the legislature, in enacting the law imposing the tax, merely referred to the registered tonnage of the steamboats "as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties."

Suppose that could be admitted, it would not have much tendency to strengthen the argument for the defendant, as the suggestion concedes what is obvious from the schedule, that the taxes are levied without any regard to the value of the steamboats. But the proposition involved in the suggestion cannot be admitted, as, by the very terms of the act, the tax is levied on the steamboats wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubical contents as ascertained by the rules of admeasurement and computation prescribed by the act of Congress.

By the terms of the law the taxation prescribed is "at the rate of one dollar per ton of the registered tonnage thereof," and the ninetieth section of the act provides that the tax collector must, each year, demand of the person in charge of the steamboat whether the taxes have been paid, and if the person in charge fails to produce a receipt therefor by a tax collector, authorized to collect such taxes, the collector having the list must at once proceed to assess the same, and if the tax is not paid on demand he must seize such steamboat, &c., and after twenty days' notice, as therein prescribed, shall sell the same, or so much thereof as will pay the taxes and expenses for keeping and costs.[9]

[9] Sess. Acts, 1866, pp. 7, 31.

Legislative enactments, where the language is unambiguous, cannot be changed by construction, nor can the language be divested of its plain and obvious meaning. Taxes levied under an enactment which directs that a tax shall be imposed on steamboats at the rate of one dollar per ton of the registered tonnage thereof, and that the same shall be assessed and collected at the port where such steamboats are registered, cannot, in the judgment of this court, be held to be a tax on the steamboat as property. On the contrary, the tax is just what the language imports, a duty of tonnage, which is made even plainer when it comes to be considered that the steamboats are not to be taxed at all unless they are "plying in the navigable waters of the State," showing to a demonstration that it is as instruments of commerce and not as property that they are required to contribute to the revenues of the State.

Such provision is much more clearly within the prohibition in question than the one involved in a recent case decided by this court, in which it was held that a statute of a State enacting that the wardens of a port were entitled to demand and receive, in addition to other fees, the sum of five dollars for every vessel arriving at the port, whether called on to perform any service or not, was both a regulation of commerce and a duty of tonnage, and that as such it was unconstitutional and void.[10]

Speaking of the same prohibition, the Chief Justice said in that case that those words in their most obvious and general sense describe a duty proportioned to the tonnage of the vessel—a certain rate on each ton—which is exactly what is directed by the provision in the tax act before the court, but he added that it seems plain, if the Constitution be taken in that restricted sense, it would not fully accomplish the intent of the framers, as the prohibition upon the States against levying duties on imports or exports would be ineffectual if it did not also extend to duties on the ships which serve as the vehicles of conveyance, which was doubtless intended by the prohibition of any duty of tonnage. "It was not only a pro rata tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."

Assume the rule to be as there laid down, and all must agree that "the levy of the tax in question is expressly prohibited, as the schedule shows that it is exactly proportioned to the registered tonnage of the steamboats plying in the navigable waters of the State." . . .

[10] Steamship Co. v. Port Wardens, 6 Wallace, 34.

Taxes in aid of the inspection laws of a State, under special circumstances, have been upheld as necessary to promote the interests of commerce and the security of navigation.[11]

Laws of that character are upheld as contemplating benefits and advantages to commerce and navigation, and as altogether distinct from imposts and duties on imports and exports and duties of tonnage. Usage, it is said, has sanctioned such laws where Congress has not legislated, but it is clear that such laws bear no relation to the act in question, as the act under consideration is emphatically an act to raise revenue to replenish the treasury of the State and for no other purpose, and does not contemplate any beneficial service for the steamboats or other vessels subjected to taxation.

Beyond question the act is an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed or to the ship-owners, and consequently it cannot be upheld by virtue of the rules applied in the construction of laws regulating pilot dues and port charges.[12]

Attempt was made in the case of Alexander v. Railroad to show that the form of levying the tax was simply a mode of assessing the vessels as property, but the argument did not prevail, nor can it in this case, as the amount of the tax is measured by the tonnage of the steamboats and not by their value as property.

Reference is made to the case of the Towboat Company v. Bordelon,[13] as asserting the opposite rule, but the court is of a different opinion, as the tax in that case was levied, not upon the boat, but upon the capital of the company owning the boat, and the court in delivering their opinion say the capital of the company is property, and the Constitution of the State requires an equal and uniform tax to be imposed upon it with the other property of the State for the support of government.

For these reasons the court is of opinion that the State law levying the taxes in this case is unconstitutional and void, that the judgment of the State Court is erroneous and that it must be reversed, and having come to that conclusion, the court does not find it necessary to determine the other question.

Judgment reversed with costs, and the cause remanded for further proceedings in conformity to the opinion of the court.

II. In the Second Case. . . . Power to tax for the support of the State governments exists in the States independently

[11] Cooley v. Port Wardens, 12 Howard, 314.

[12] State v. Charleston, 4 Rich., S. C., 286; Benedict v. Vanderbilt, 1 Robt. N. Y., 200.

[13] 7 Louisiana An., 195.

of the Federal government, and it may well be admitted that where there is no cession of jurisdiction for the purposes specified in the Constitution, and no restraining compact between the States and the Federal government, the power in the States to tax reaches all the property within the State which is not properly denominated the instruments or means of the Federal government.[14]

Concede all that and still the court is of opinion that the tax in this case is a duty of tonnage, and that the law imposing it is plainly unconstitutional and void. Taxes, as the law provides, must be assessed by the assessor in each county on and from the following subjects and at the following rates, to wit: "On all steamboats, &c., plying in the navigable waters of the State, at the rate of one dollar per ton of the registered tonnage thereof," which must be assessed and collected at the port where such steamboats are registered, &c.[15] Copied as the provision is from the enactment of the previous year, it is obvious that it must receive the same construction, and as the tax is one dollar per ton, it is too plain for argument that the amount of the tax depends upon the carrying capacity of the steamboat and not upon her value as property, as the experience of every one shows that a small steamer, new and well built, may be of much greater value than a large one, badly built or in need of extensive repairs. Separate lists are made for the county and school taxes, but the two combined amount exactly to one dollar per ton, as in the levy for the State tax, and the court is of the opinion that the case falls within the same rule as the case just decided.

Evidently the word tonnage in commercial designation means the number of tons burden the ship or vessel will carry, as estimated and ascertained by the official admeasurement and computation prescribed by the public authority. Regulations upon the subject are enacted by Parliament in the parent country and by Congress in this country, as appears by several acts of Congress.[16] Tonnage, says a writer of experience, has long been an official term intended originally to express the burden that a ship would carry, in order that the various dues and customs which are levied upon shipping might be levied according to the size of the vessel, or rather in proportion to her capability of carry-

[14] Nathan v. Louisiana, 8 Howard, 82; McCulloch v. Maryland, 4 Wheaton, 429; Society for Savings v. Coite, 6 Wallace, 604; Brown v. Maryland, 12 Wheaton, 448; Weston v. Charleston, 2 Peters, 467.

[15] Revised Code, 169.

[16] 1 Stat. at Large, 305; 13 Id., 444.

ing burden. Hence the term, as applied to a ship, has become almost synonymous with that of size.[17] Apply that interpretation to the word tonnage as used in the tax act under consideration, and it is as clear as anything can be in legislation that the tax imposed by that provision is a tonnage tax, or duty of tonnage, as the phrase is in the Constitution.

State authority to tax ships and vessels, it is supposed by the respondent, extends to all cases where the ship or vessel is not employed in foreign commerce or in commerce between ports or places in different States. He concedes that the States cannot levy a duty of tonnage on ships or vessels if the ship or vessel is employed in foreign commerce or in commerce "among the States," but he denies that the prohibition extends to ships or vessels employed in commerce between ports and places in the same State, and that is the leading error in the opinion of the Supreme Court of the State. Founded upon that mistake the proposition is that all taxes are taxes on property, although levied on ships and vessels duly enrolled and licensed, if the ship or vessel is not employed in foreign commerce or in commerce among the States.

Ships or vessels of ten or more tons burden, duly enrolled and licensed, if engaged in commerce on waters which are navigable by such vessels from the sea, are ships and vessels of the United States entitled to the privileges secured to such vessels by the act for enrolling or licensing ships or vessels to be employed in the coasting trade.[18]

Such a rule as that assumed by the respondent would incorporate into the Constitution an exception which it does not contain. Had the prohibition in terms applied only to ships and vessels employed in foreign commerce or in commerce among the States, his construction would be right, but courts of justice cannot add any new provision to the fundamental law, and, if not, it seems clear to a demonstration that the construction assumed by the respondent is erroneous.

Decree reversed, and the cause remanded for further proceedings in conformity to the opinion of this court.

[17] Homan's Com. and Nav. Tonnage.

[18] 1 Stat. at Large, 205; Ib., 287.

Important Loan.

LOAN ASSOCIATION v. TOPEKA.

20 Wallace, 655. Decided 1874.

ERROR to the Circuit Court for the District of Kansas.

The Citizens' Savings and Loan Association of Cleveland brought their action in the court below, against the city of Topeka, on coupons for interest attached to bonds of the city of Topeka.

The bonds on their face purported to be payable to the King Wrought-Iron Bridge Manufacturing and Iron-Works Company, of Topeka, to aid and encourage that company in establishing and operating bridge shops in said city of Topeka, under and in pursuance of section twenty-six of an act of the legislature of the State of Kansas, entitled "An act to incorporate cities of the second class," approved February 29, 1872; and also of another "Act to authorize cities and counties to issue bonds for the purpose of building bridges, aiding railroads, water-power, or other works of internal improvement," approved March 2, 1872.

The city issued one hundred of these bonds for $1,000 each, as a donation (and so it was stated in the declaration), to encourage that company in its design of establishing a manufactory of iron bridges in that city.

The declaration also alleged that the interest coupons first due were paid out of a fund raised by taxation for that purpose, and that after this payment the plaintiff became the purchaser of the bonds and the coupons on which suit was brought for value.

A demurrer was interposed by the city of Topeka to this declaration.

The section of the act of February 29, on which the main reliance was placed for the authority to issue these bonds, reads as follows:

"SECTION 76. The council shall have power to encourage the establishment of manufactories and such other enterprises as may tend to develop and improve such city, either by direct appropriation from the general fund or by the issuance of bonds of such city in such amounts as the council may determine; Provided, That no greater amount than one thousand dollars shall be granted for any one purpose, unless a majority of the votes cast at an election called for that purpose shall authorize the same. The bonds thus issued shall be made payable at any time within twenty years, and bear interest not exceeding ten per cent. per annum."

It was conceded that the steps required by this act prerequisite as to issuing the bonds were regular, as were also the other details, and that the language of the statute was sufficient to justify the action of the city authorities, if the statute was within the constitutional competency of the legislature.

The single question, therefore, for consideration raised by the demurrer was the authority of the legislature of the State of Kansas to enact this part of the statute.

The court below denied the authority, placing the denial on two grounds:—

1st. That this part of the statute violated the fifth section of Article XII of the Constitution of the State of Kansas; a section in these words:—

"SECTION 5. Provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power."

[The argument here was that the section of the act of February 29, 1872, conferring the power to issue bonds, contained no restriction as to the amount which the city might issue to aid manufacturing enterprises, and that the failure of the legislature to limit and restrict the power so as to prevent abuse, violated the fifth section of Article XII of the Constitution above referred to.]

2d. That the act authorized the towns and other municipalities to which it applied, by issuing bonds or lending its credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which were not of a public character; that this was a perversion of the right of taxation, which could only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The court below accordingly, sustaining the demurrer, gave judgment in favor of the defendant, the city of Topeka, and to its judgment this writ of error was taken. . . .

MR. JUSTICE MILLER delivered the opinion of the court.

Two grounds are taken in the opinion of the circuit judge and in the argument of counsel for defendant, on which it is insisted that the section of the statute of February 29, 1872, on which the main reliance is placed to issue the bonds, is unconstitutional.

The first of these is, that by section five of article twelve of the Constitution of that State it is declared that provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power.

The argument is that the statute in question is void because it authorizes cities and towns to contract debts, and does not contain any restriction on the power so conferred. But whether the statute which confers power to contract debts should always contain some limitation or restriction, or whether a general restriction applicable to all cases should be passed, and whether in the absence of both the grant of power to contract is wholly void, are questions whose solution we prefer to remit to the State courts, as in this case we find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the Circuit Court.

That proposition is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution.

If these municipal corporations, which are in fact subdivisions of the State, and which for many reasons are vested with quasi-legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the State to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid

in future, not limited to payment from some other source, imply an obligation to pay by taxation. It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy the tax for that purpose.[1]

It is, therefore, to be inferred that when the legislature of the State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.

With these remarks and with the reference to the authorities which support them, we assume that unless the legislature of Kansas had the right to authorize the counties and towns in that State to levy taxes to be used in aid of manufacturing enterprises, conducted by individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void. We proceed to the inquiry whether such a power exists in the legislature of the State of Kansas.

We have already said the question is not new. The subject of the aid voted to railways by counties and towns has been brought to the attention of the courts of almost every State in the Union. It has been thoroughly discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the States, unless restricted by some special provisions of their constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they

[1] Sharpless v. Mayor of Philadelphia, 21 Pennsylvania State, 147, 167; Hanson v. Vernon, 27 Iowa, 28; Allen v. Inhabitants of Jay, 60 Maine, 127; Lowell v. Boston, Massachusetts (MS.); Whiting v. Fond du Lac, 25 Wisconsin, 188.

were composed, while others have decided against the existence of the power altogether.[2]

In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and the duty of State governments to assist by money raised from the people by taxation. The argument in opposition to this power has been, that railroads built by corporations organized mainly for purposes of gain—the roads which they built being under their control, and not that of the State—were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the State, or the benefit of the public, except in a remote and collateral way. On the other hand, it was said that roads, canals, bridges, navigable streams, and all other highways had in all times been matter of public concern. That such channels of travel and of the carrying business had always been established, improved, regulated by the State, and that the railroad had not lost this character because constructed by individual enterprise, aggregated into a corporation.

We are not prepared to say that the latter view of it is not the true one, especially as there are other characteristics of a public nature conferred on these corporations, such as the power to obtain right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition. Of the disastrous consequences which have followed its recognition by the courts and which were predicted when it was first established there can be no doubt.

We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State legislature to tax the people, but conceded that where the purpose for which the tax was to be issued,

[2] The State v. Wapello Co., 9 Iowa, 308; Hanson v. Vernon, 27 Id., 28; Sharpless v. Mayor, etc., 21 Pennsylvania State, 147; Whiting v. Fond du Lac, 25 Wisconsin, 188.

could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right.[3]

It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, State and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B.[4]

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfuly used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of

[3] Olcott v. Supervisors, 16 Wallace, 689; People v. Salem, 20 Michigan, 452; Jenkins v. Andover, 103 Massachusetts, 94; Dillon on Municipal Corporations, § 587; 2 Redfield's Laws of Railways, 398, rule 2.

[4] Whiting v. Fond du Lac, 25 Wisconsin, 188; Cooley on Constitutional Limitations, 129, 175, 487; Dillon on Municipal Corporations, § 587.

war, the national defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of McCulloch v. The State of Maryland,[5] that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent., imposed by the United States on the circulation of all other banks than the National banks, drove out of existence every State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Nor is it taxation. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or State." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes."[6]

Coulter, J., in Northern Liberties v. St. John's Church,[7] says, very forcibly: "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose."

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

[5] 4 Wheaton, 431.

[6] Cooley on Constitutional Limitations, 479.

[7] 13 Pennsylvania State, 104; see also Pray v. Northern Liberties, 31 Id., 69; Matter of Mayor of New York, 11 Johnson, 77; Camden v. Allen, 2 Dutcher, 398; Sharpless v. Mayor of Philadelphia, supra; Hanson v. Vernon, 27 Iowa, 47; Whiting v. Fond du Lac, 25 Wisconsin, 188.

It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town. . . .

Judgment affirmed.

[Mr. Justice Clifford delivered a dissenting opinion.]

SPRINGER v. UNITED STATES.

102 U. S., 586. Decided 1880.

[Error to the Circuit Court of the United States for the Southern District of Illinois. The facts are sufficiently stated in the opinion of the court.]

Mr. Justice Swayne, after stating the facts, delivered the opinion of the court.

The central and controlling question in this case is whether the tax which was levied on the income, gains, and profits of the plaintiff in error, as set forth in the record, and by pretended virtue of the acts of Congress and parts of acts therein mentioned, is a direct tax. . . . If it was, not having been laid according to the requirements of the Constitution, it must be admitted that the laws imposing it, and the proceedings taken under them by the assessor and collector for its imposition and collection, were all void.

Many of the provisions of the Articles of Confederation of 1777 were embodied in the existing organic law. They provided for a common treasury and the mode of supplying it with funds. The latter was by requisitions upon the several States. The delays and difficulties in procuring the compliance of the States, it is known, was one of the causes that led to the adoption of the present Constitution. This clause of the articles throws no light on the question we are called upon to consider. Nor does the journal of the proceedings of the constitutional convention of 1787 contain anything of much value relating to the subject.

It appears that on the 11th of July, in that year, there was a debate of some warmth involving the topic of slavery. On the day following, Gouverneur Morris, of New York, submitted a proposition "that taxation shall be in proportion to representation." It is further recorded in this day's proceedings, that Mr. Morris having so varied his motion by inserting the word "direct," it passed nem. con., as follows: "Provided always, that direct taxes ought to be proportioned to representation." 2 Madison Papers, by Gilpin, pp. 1079-1081.

On the 24th of the same month, Mr. Morris said that "he hoped the committee would strike out the whole clause. . . . He had only meant it as a bridge to assist us over a gulf; having passed the gulf, the bridge may be removed. He thought the principle laid down with so much strictness liable to strong objections." Id. 1197. The gulf was the share of representation claimed by the Southern States on account of their slave population. But the bridge remained. The builder could not remove it, much as he desired to do so. All parties seem thereafter to have avoided the subject. With one or two immaterial exceptions, not necessary to be noted, it does not appear that it was again adverted to in any way. It was silently incorporated into the draft of the Constitution as that instrument was finally adopted.

It does not appear that an attempt was made by any one to define the exact meaning of the language employed.

In the twenty-first number of the Federalist, Alexander Hamilton, speaking of taxes generally, said: "Those of the direct kind, which principally relate to land and buildings, may admit of a rule of apportionment. Either the value of the land, or the number of the people, may serve as a standard." The thirty-sixth number of that work, by the same author, is devoted to the subject of internal taxes. It is there said, "They may be subdivided into those of the direct and those of the indirect kind." In this connection land-taxes and poll-taxes are discussed. The former are commended and the latter are condemned. Nothing is said of any other direct tax. In neither case is there a definition given or attempted of the phrase, "direct tax."

The very elaborate researches of the plaintiff in error have furnished us with nothing from the debates of the State conventions, by whom the Constitution was adopted, which gives us any aid. Hence we may safely assume that no such material exists in that direction, though it is known that Virginia proposed to Congress an amendment relating to the subject, and that Massachusetts, South Carolina, New York, and North Carolina expressed strong disapprobation of the power given to impose such burdens. 1 Tucker's Blackstone, pt. 1, app., 235.

Perhaps the two most authoritative persons in the convention touching the Constitution were Hamilton and Madison. The latter, in a letter of May 11, 1794, speaking of the tax which was adjudicated upon in Hylton v. United States (3 Dall., 171), said, "The tax on carriages succeeded in spite of the Constitution by a majority of twenty, the advocates of the principle being reinforced by the adversaries of luxury." 2 Mad. Writings (pub. by Congress), p. 14. In another letter, of the 7th of February, 1796, referring to the case of Hylton v. United States, then pending, he remarked: "There never was a question on which my mind was better satisfied, and yet I have very little expectation that it will be viewed in the same light by the court that it is by me." Id., 77. Whence the despondency thus expressed is unexplained.

Hamilton left behind him a series of legal briefs, and among them one entitled "Carriage tax." See vol. vii., p. 848, of his works. This paper was evidently prepared with a view to the Hylton case, in which he appeared as one of the counsel for the United States. In it he says: "What is the distinction between direct and indirect taxes? It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms. There is none. We

shall be as much at a loss to find any disposition of either which can satisfactorily determine the point." There being many carriages in some of the States, and very few in others, he points out the preposterous consequences if such a tax be laid and collected on the principle of apportionment instead of the rule of uniformity. He insists that if the tax there in question was a direct tax, so would be a tax on ships, according to their tonnage. He suggests that the boundary line between direct and indirect taxes be settled by "a species of arbitration," and that direct taxes be held to be only "capitation or poll taxes, and taxes on lands and buildings, and general assessments, whether on the whole property of individuals or on their whole real or personal estate. All else must, of necessity, be considered as indirect taxes."

The tax here in question falls within neither of these categories. It is not a tax on the "whole . . . personal estate" of the individual, but only on his income, gains, and profits during a year, which may have been but a small part of his personal estate, and in most cases would have been so. This classification lends no support to the argument of the plaintiff in error.

The Constitution went into operation on the 4th of March, 1789.

It is important to look into the legislation of Congress touching the subject since that time. The following summary will suffice for our purpose. We shall refer to the several acts of Congress to be examined, according to their sequence in dates. In all of them the aggregate amount required to be collected was apportioned among the several States.

The act of July 14, 1798, c. 75, 1 Stat. 53. This act imposed a tax upon real estate and a capitation tax upon slaves.

The act of Aug. 2, 1813, c. 37, 3 Id. 53. By this act the tax was imposed upon real estate and slaves, according to their respective values in money.

The act of Jan. 19, 1815, c. 21, Id. 164. This act imposed the tax upon the same descriptions of property, and in like manner as the preceding act.

The act of Feb. 27, 1815, c. 60, Id. 216, applied to the District of Columbia the provisions of the act of Jan. 19, 1815.

The act of March 5, 1816, c. 24, Id. 255, repealed the two preceding acts, and re-enacted their provisions to enforce the collection of the smaller amount of tax thereby prescribed.

The act of Aug. 5, 1861, c. 45, 12 Id. 294, required the tax to be levied wholly on real estate.

The act of June 7, 1862, c. 98, Id. 422, and the act of Feb. 6, 1863, c. 21, Id. 640, both relate only to the collection, in insurrec-

tionary districts, of the direct tax imposed by the act of Aug. 5, 1861, and need not, therefore, be more particularly noticed.

It will thus be seen that whenever the government has imposed a tax which it recognized as a direct tax, it has never been applied to any objects but real estate and slaves. The latter application may be accounted for upon two grounds: 1. In some of the States slaves were regarded as real estate (1 Hurd, Slavery, 239; Veazie Bank v. Fenno, 8 Wall., 533); and, 2. Such an extension of the tax lessened the burden upon the real estate where slavery existed, while the result to the national treasury was the same, whether the slaves were omitted or included. The wishes of the South were, therefore, allowed to prevail. We are not aware that the question of the validity of such a tax was ever presented for adjudication. Slavery having passed away, it cannot hereafter arise. It does not appear that any tax like the one here in question was ever regarded or treated by Congress as a direct tax. This uniform practical construction of the Constitution touching so important a point, through so long a period, by the legislative and executive departments of the government, though not conclusive, is a consideration of great weight.

There are four adjudications by this court to be considered. They have an important, if not a conclusive, application to the case in hand. . . . [Here follows a discussion of Hylton v. United States, 3 Dallas, 171.] In Pacific Insurance Co. v. Soule (7 Wall., 433), the taxes in question were upon the receipts of such companies from premiums and assessments, and upon all sums made or added, during the year, to their surplus or contingent funds. This court held unanimously that the taxes were not direct taxes, and that they were valid. . . . [Here follows an extract from Veazie Bank v. Fenno, 8 Wallace, 533.] In Scholey v. Rew (23 Wall., 331), the tax involved was a succession tax, imposed by the acts of Congress of June 30, 1864, and July 13, 1866. It was held that the tax was not a direct tax, and that it was constitutional and valid. In delivering the opinion of the court, Mr. Justice Clifford, after remarking that the tax there in ques- was not a direct tax, said: "Instead of that, it is plainly an excise tax or duty, authorized by sect. 1, art. 8, of the Constitution, which vests the power in Congress to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare." He said further: "Taxes on houses, lands, and other permanent real estate have always been deemed to be direct taxes, and capitation taxes, by the express words of the Constitution, are within the same category; but it has never

been decided that any other legal exactions for the support of the Federal government fall within the condition that unless laid in proportion to numbers the assessment is invalid."

All these cases are undistinguishable in principle from the case now before us, and they are decisive against the plaintiff in error.

The question, what is a direct tax, is one exclusively in American jurisprudence. The text-writers of the country are in entire accord upon the subject.

Mr. Justice Story says all taxes are usually divided into two classes,—those which are direct and those which are indirect,—and that "under the former denomination are included taxes on land or real property, and, under the latter, taxes on consumption." 1 Const., sect. 950.

Chancellor Kent, speaking of the case of Hylton v. United States, says: "The better opinion seemed to be that the direct taxes contemplated by the Constitution were only two, viz., a capitation or poll tax and a tax on land." 1 Com., 257. See also Cooley, Taxation, p. 5, note 2; Pomeroy, Const. Law, 157; Sharswood's Blackstone, 308, note; Rawle, Const., 30; Sergeant, Const., 305.

We are not aware that any writer, since Hylton v. United States was decided, has expressed a view of the subject different from that of these authors.

Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty. Pomeroy, Const. Law, 177; Pacific Insurance Co. v. Soule, and Scholey v. Rew, supra.

Against the considerations, in one scale, in favor of these propositions, what has been placed in the other, as a counterpoise? Our answer is, certainly nothing of such weight, in our judgment, as to require any special reply. The numerous citations from the writings of foreign political economists, made by the plaintiff in error, are sufficiently answered by Hamilton in his brief, before referred to. *Judgment affirmed.*

Important

POLLOCK v. FARMERS' LOAN AND TRUST COMPANY. (Rehearing.)

HYDE v. CONTINENTAL TRUST COMPANY. (Rehearing.)

158 U. S., 601. Decided 1895.

[This was a bill filed by Charles Pollock, a citizen of the State of Massachusetts, on behalf of himself and all other stock-holders of the defendant company similarly situated, against the Farmers' Loan and Trust Co., a corporation of the State of New York. The bill alleged that the defendant claimed authority under the provisions of the act of Congress of August 15, 1894, to pay to the United States a tax of two per centum on the net profits of said company, including the income derived from real estate and bonds of the City of New York owned by it. The bill further alleged that such a tax was unconstitutional, null, and void, in that it was a direct tax with respect to the income from real estate, and in that the income from stocks and bonds of the States of the United States and counties and municipalities therein is not subject to the taxing power of Congress. The bill prayed that the provisions known as the income tax incorporated in the act of Congress of August 15, 1894, might be adjudged unconstitutional, null, and void, and that the defendants might be restrained from voluntarily complying with such provisions. On April 8, 1895, the Court, one justice being absent, decided:

"A tax on the rents or income of real estate is a direct tax, within the meaning of that term as used in the Constitution of the United States.

"A tax upon incomes derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the State and its instrumentalities to borrow money, and is consequently repugnant to the Constitution of the United States.

"Upon each of the other questions argued at bar, to wit: 1. Whether the void provision as to rent and income from real estate invalidates the whole act? 2. Whether as to the income from personal property as such, the act is unconstitutional, as laying direct taxes? 3. Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested?—the Justices who heard the argument are equally divided, and, therefore, no opinion is expressed." (157 U. S., 429.)

Inasmuch as the cases had not been heard by a full court, and

since the question upon which the court was equally divided still lacked authoritative determination, the appellants were granted a rehearing. The cases were re-argued before the full bench, and on May 20, 1895, the following opinion was rendered.]

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Whenever this court is required to pass upon the validity of an act of Congress as tested by the fundamental law enacted by the people, the duty imposed demands in its discharge the utmost deliberation and care and invokes the deepest sense of responsibility. And this is especially so when the question involves the exercise of a great governmental power and brings into consideration, as vitally affected by the decision, that complex system of government so sagaciously framed to secure and perpetuate "an indestructible union composed of indestructible States."

We have, therefore, in anxious desire to omit nothing which might in any degree tend to elucidate the questions submitted, and aided by further able arguments embodying the fruits of elaborate research, carefully re-examined these cases, with the result that, while our former conclusions remain unchanged, their scope must be enlarged by the acceptance of their logical consequences. The very nature of the constitution, as observed by Chief Justice Marshall in one of his greatest judgments, "requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deducted from the nature of the objects themselves." "In considering this question, then, we must never forget that it is a Constitution that we are expounding." McCulloch v. Maryland, 4 Wheat., 316, 407.

As heretofore stated, the Constitution divided Federal taxation into two great classes, the class of direct taxes and the class of duties, imposts, and excises and prescribed two rules which qualified the grant of power as to each class.

The power to lay direct taxes, apportioned among the several States in proportion to their representation in the popular branch of Congress, a representation based on population as ascertained by the census, was plenary and absolute, but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts, and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate and on the income from municipal bonds. The question thus limited, was

whether such taxation was direct or not, in the meaning of the Constitution, and the court went no further as to the tax on the incomes from real estate than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed, because of want of power to tax the source, and no reference was made to the nature of the tax being direct or indirect.

We are now permitted to broaden the field of inquiry and determine to which of the two great classes a tax upon a person's entire income, whether derived from rents or products or otherwise, of real estate, or from bonds, stocks or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself that it is not a direct but an indirect tax in the meaning of the Constitution.

The words of the Constitution are to be taken in their obvious sense and to have a reasonable construction. In Gibbons v. Ogden, Chief Justice Marshall, with his usual felicity, said:

"As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it must be understood to have employed words in their natural sense and to have intended what they have said." 9 Wheat., 1, 188. . . .

We know of no reason for holding otherwise than that the words "direct taxes" on the one hand, and "duties, imposts, and excises" on the other, were used in the Constitution in their natural and obvious sense, nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified. . . .

[Here follows a discussion of the views of Hamilton and Madison and of the Hylton case.]

What was decided in the Hylton case was, then, that a tax on carriages was an excise, and, therefore, an indirect tax. The contention of Mr. Madison in the House was only so far disturbed by it, that the court classified it where he himself would have held it constitutional, and he subsequently as President approved a similar act. 3 Stat., 40. The contention of Mr. Hamilton in the Fed-

eralist was not disturbed by it in the least. In our judgment, the construction given to the Constitution by the authors of the Federalist (the five numbers contributed by Chief Justice Jay related to the danger from foreign force and influence, and to the treaty-making power) should not and cannot be disregarded. . . .

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be only one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property and the property itself.

Nor can we conceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the State are laid and assessed."

. . .

Nor are we impressed with the argument that because in the four instances in which the power of direct taxation has been exercised, Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist, that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general government thus re-

stricted, and certainly cannot accede to the idea that the Constitution has become weakened by a particular course of inaction under it.

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, nor a crop tax, nor a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source whence it is derived.

This was the view entertained by Mr. Pitt as expressed in his celebrated speech on introducing his income-tax law of 1799, and he did not hesitate to carry it to its logical conclusion. The English loan acts provided that the public dividends should be paid "free of all taxes and charges whatsoever;" but Mr. Pitt successfully contended that the dividends for the purposes of the income tax were to be considered simply in relation to the recipient as so much income, and that the holder had no reason to complain. And this, said Mr. Gladstone fifty-five years after, was the rational construction of the pledge. Financial Statements, 32. . . .

We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the States, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it should have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real estate and personal property equally exists as to the revenue therefrom.

Admitting that this act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution. . . .

Being direct, and therefore to be laid by apportionment, is there any real difficulty in doing so? Cannot Congress, if the necessity

exist of raising thirty, forty, or any other number of million dollars for the support of the government, in addition to the revenue from duties, imposts, and excises, apportion the quota of each State upon the basis of the census, and thus advise it of the payment which must be made, and proceed to assess that amount on all the real or personal property and the income of all persons in the State, and collect the same if the State does not in the meantime assume and pay its quota and collect the amount according to its own system and in its own way? Cannot Congress do this as respects either or all these subjects of taxation, and deal with each in such manner as might be deemed expedient, as indeed was done in the act of July 14, 1798 (C., 75, 1 Stat., 597)? Inconveniences might possibly attend the levy of an income tax, notwithstanding the listing of receipts, when adjusted, furnishes its own valuation; but that it is apportionable is hardly denied, although it is asserted that it would operate so unequally as to be undesirable.

In the disposition of the inquiry whether a general unapportioned tax on the income of real and personal property can be sustained, under the Constitution, it is apparent that the suggestion that the result of compliance with the fundamental law would lead to the abandonment of that method of taxation altogether, because of the inequalities alleged to necessarily accompany its pursuit could not be allowed to influence the conclusion; but the suggestion not unnaturally invites attention to the contention of appellants' counsel, that the want of uniformity and equality in this act is such as to invalidate it. Figures drawn from the census are given, showing that enormous assets of mutual insurance companies; of building associations; of mutual savings banks; large productive property of ecclesiastical oragnizations; are exempted, and it is claimed that the exemptions reach so many hundred millions that the rate of taxation would perhaps have been reduced one-half, if they had not been made. We are not dealing with the act from that point of view; but, assuming the data to be substantially reliable, if the sum desired to be raised had been apportioned, it may be doubted whether any State, which paid its quota and collected the amount by its own methods, would, or could under its Constitution, have allowed a large part of the property alluded to to escape taxation. If so, a better measure of equality would have been attained than would be otherwise possible, since, according to the argument for the government, the rule of equality is not prescribed by the Constitution as to Federal taxation, and the observance of such a rule as inherent in all just taxation is purely a matter of legislative discretion.

Elaborate argument is made as to the efficacy and merits of an income tax in general, as on the one hand, equal and just, and on the other, elastic and certain; not that it is not open to abuse by such deductions and exemptions as might make taxation under it so wanting in uniformity and equality as in substance to amount to deprivation of property without due process of law; not that it is not open to fraud and evasion and is inquisitorial in its methods; but because it is pre-eminently a tax upon the rich, and enables the burden of taxes on consumption and of duties on imports to be sensibly diminished. And it is said that the United States, as "the representative of an indivisible nationality, as a political sovereign equal in authority to any other on the face of the globe, to all emergencies, foreign or domestic, and having at its command for offense and defense and for all governmental purposes all the resources of the nation," would be "but a maimed and crippled creation after all," unless it possesses the power to lay a tax on the income of real and personal property throughout the United States without apportionment.

The power to tax real and personal property and the income from both, there being an apportionment, is conceded; that such a tax is a direct tax in the meaning of the Constitution has not been, and, in our judgment, cannot be successfully denied; and yet we are thus invited to hesitate in the enforcement of the mandate of the Constitution which prohibits Congress from laying a direct tax on the revenue from property of the citizen without regard to State lines, and in such manner that the States cannot intervene by payment in regulation of their own resources, lest a government of delegated powers should be found to be, not less powerful, but less absolute, than the imagination of the advocate had supposed.

We are not here concerned with the question whether an income tax be or be not desirable, nor whether such a tax would enable the government to diminish taxes on consumption and duties on imports and to enter upon what may be believed to be a reform of its fiscal and commercial system. Questions of that character belong to the controversies of political parties, and cannot be settled by judicial decision. In these cases our province is to determine whether this income tax on the revenue from property does or does not belong to the class of direct taxes. If it does, it is, being unapportioned, in violation of the Constitution, and we must so declare. . . .

We have considered the act only in respect of the tax on income

derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole.

It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which relate to the subject which has been under discussion; and as to them we think that the rule laid down by Chief Justice Shaw in Warren v. Charlestown, 2 Gray, 84, is applicable, that if the different parts "are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them." Or, as the point is put by Mr. Justice Matthews in Poindexter v. Greenhow, 114 U. S., 270, 304: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforcable, even though the other part should fail. To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact." And again, as stated by the same eminent judge in Spraigue v. Thompson, 118 U. S., 90, 95, where it was urged that certain illegal exceptions in a section of a statute might be disregarded, but that the rest could stand: "The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what

confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

According to the census, the true valuation of real and personal property in the United States in 1890 was $65,037,091,197, of which real estate with improvements thereon made up $39,544,544,333. Of course, from the latter must be deducted, in applying these sections, all unproductive property and all property whose net yield does not exceed four thousand dollars; but, even with such deductions, it is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out, and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor. We cannot believe that such was the intention of Congress. We do not mean to say that such an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations. But this is not such an act; and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, we are constrained to conclude that sections twenty-seven to thirty-seven, inclusive, of the act which became a law without the signature of the President on August 28, 1894, are wholly inoperative and void.

Our conclusions may, therefore, be summed up as follows:

First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or incomes of real estate are equally direct taxes.

Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

Third. The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all

those sections, constituting one entire scheme of taxation, are necessarily invalid.

The decrees hereinbefore entered in this court will be vacated; the decrees below will be reversed, and the cases remanded, with instructions to grant the relief prayed.

[Dissenting opinions were delivered by JUSTICES HARLAN, BROWN, JACKSON, and WHITE.]

III. MONEY.

CRAIG ET AL. v. THE STATE OF MISSOURI.

4 Peters, 410. Decided 1830.

The case is stated in the opinion of the court. . . .

MARSHALL, C. J., delivered the opinion of the court, Justices Thompson, Johnson, and McLean dissenting.

This is a writ of error to a judgment rendered in the court of last resort, in the State of Missouri, affirming a judgment obtained by the State in one of its inferior courts, against Hiram Craig and others, on a promissory note. . . .

The declaration is on a promissory note, dated on the first day of August, 1822, promising to pay to the State of Missouri, on the 1st day of November, 1822, at the loan office in Chariton, the sum of $199.99, and the two per cent. per annum, the interest accruing on the certificates borrowed from the 1st of October, 1821. This note is obviously given for certificates loaned under the act, "for the establishment of loan offices." That act directs that loans on personal security shall be made of sums less than $200. This note is for $199.99. The act directs that the certificates issued by the State shall carry two per cent. interest from the date, which interest shall be calculated in the amount of the loan. The note promises to repay the sum with the two per cent. interest accruing on the certificates borrowed from the 1st day of October, 1821. It cannot be doubted that the declaration is on a note given in pursuance of the act which has been mentioned.

Neither can it be doubted that the plea of non-assumpsit allowed the defendants to draw into question at the trial the validity of the consideration on which the note was given. Everything which disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue in an action of assumpsit. The defendants, therefore, were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated. . . .

This brings us to the great question in the cause: Is the act of the legislature of Missouri repugnant to the constitution of the United States?

The counsel for the plaintiffs in error maintain that it is repugnant to the constitution, because its object is the emission of bills of credit, contrary to the express prohibition contained in the tenth section of the first article.

The act under the authority of which the certificates loaned to the plaintiffs in error were issued, was passed on the 26th of June, 1821, and is entitled "an act for the establishment of loan-offices." The provisions that are material to the present inquiry are comprehended in the third, thirteenth, fifteenth, sixteenth, twenty-third, and twenty-fourth sections of the act, which are in these words:

Section the third enacts, "that the auditor of public accounts and treasurer, under the direction of the governor, shall, and they are hereby required to issue certificates, signed by the said auditor and treasurer, to the amount of $200,000, of denominations not exceeding ten dollars, nor less than fifty cents, (to bear such devices as they may deem the most safe,) in the following form, to wit:—'This certificate shall be receivable at the treasury, or any of the loan-offices of the State of Missouri, in the discharge of taxes or debts due to the State, for the sum of $——, with interest for the same, at the rate of two per centum per annum from this date, the —— day of ——, 182—.'"

The thirteenth section declares, "that the certificates of the said loan-offices shall be receivable at the treasury of the State, and by all tax-gatherers and other public officers, in payment of taxes or other moneys now due to the State, or to any county or town therein, and the said certificates shall also be received by all officers, civil and military, in the State, in the discharge of salaries and fees of office."

The fifteenth section provides, "that the commissioners of the said loan-offices shall have power to make loans of the said certificates, to citizens of this State, residing within their respective districts only, and in each district a proportion shall be loaned to the citizens of each county therein, according to the number thereof," &c.

Section sixteenth. "That the said commissioners of each of the said offices are further authorized to make loans on personal securities, by them deemed good and sufficient, for sums less than two hundred dollars; which securities shall be jointly and sever-

ally bound for the payment of the amount so loaned, with interest thereon," &c.

Section twenty-third. "That the general assembly shall, as soon as may be, cause the salt springs and lands attached thereto, given by congress to this State, to be leased out; and it shall always be the fundamental condition in such leases, that the lessee or lessees shall receive the certificates hereby required to be issued, in payment for salt, at a price not exceeding that which may be prescribed by law; and all the proceeds of the said salt springs, the interest accruing to the State, and all estates purchased by officers of the said several offices, under the provisions of this act, and all the debts now due or hereafter to be due to this State, are hereby pledged and constituted a fund for the redemption of the certificates hereby required to be issued, and the faith of the State is hereby also pledged for the same purpose."

Section twenty-fourth. "That it shall be the duty of the said auditor and treasurer to withdraw annually from circulation, one-tenth part of the certificates which are hereby required to be issued," &c.

The clause in the constitution which this act is supposed to violate is in these words: "No State shall . . . emit bills of credit."

What is a bill of credit? What did the constitution mean to forbid?

In its enlarged, and perhaps its literal sense, the term "bill of credit" may comprehend any instrument by which a State engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limits the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated "bills of credit." To "emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood.

At a very early period of our colonial history, the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent; and the bills emitted for this purpose have been frequently denominated bills of credit. During

the war of our Revolution, we were driven to this expedient; and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning; and "bills of credit" signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all, the people declared in their constitution, that no State should emit bills of credit. If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium, by a State government, for the purpose of common circulation.

What is the character of the certificates issued by authority of the act under consideration? What office are they to perform? Certificates signed by the auditor and treasurer of the State, are to be issued by those officers to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents. The paper purports on its face to be receivable at the treasury, or at any loan office of the State of Missouri, in discharge of taxes or debts due to the State.

The law makes them receivable in discharge of all taxes, or debts due to the State, or any county or town therein; and of all salaries and fees of office, to all officers civil and military within the State; and for salt sold by the lessees of the public salt works. It also pledges the faith and funds of the State for their redemption.

It seems impossible to doubt the intention of the legislature in passing this act, or to mistake the character of these certificates, or the office they were to perform. The denominations of the bills, from ten dollars to fifty cents, fitted them for the purpose of ordinary circulation; and their reception in payment of taxes, and debts to the government and to corporations, and of salaries and fees, would give them currency. They were to be put into circulation; that is, emitted by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character; and directs the auditor and treasurer to withdraw annually one-tenth of them from circulation. Had they

been termed "bills of credit," instead of "certificates," nothing would have been wanting to bring them within the prohibitory words of the constitution.

And can this make any real difference? Is the proposition to be maintained, that the constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely bills of credit as if they had been so denominated in the act itself.

But it is contended, that though these certificates should be deemed bills of credit, according to the common acceptation of the term, they are not so in the sense of the constitution; because they are not made a legal tender.

The constitution itself furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of credit, not to bills of a particular description. That tribunal must be bold, indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case, because the same clause of the constitution contains a substantive prohibition to the enactment of tender laws. The constitution, therefore, considers the emission of bills of credit, and the enactment of tender laws, as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one, because it is not also the other; to say that bills of credit may be emitted, if they be not made a tender in payment of debts,—is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted. We are not at liberty to do this.

The history of paper money has been referred to, for the purpose of showing that its great mischief consists in being made a tender; and that therefore the general words of the constitution may be restrained to a particular intent.

Was it even true, that the evils of paper money resulted solely from the quality of its being made a tender, this court would not feel itself authorized to disregard the plain meaning of words, in search of a conjectural intent to which we are not conducted by the language of any part of the instrument. But we do not think that the history of our country proves either, that being made a tender in payment of debts is an essential quality of bills

of credit, or the only mischief resulting from them. It may, indeed, be the most pernicious; but that will not authorize a court to convert a general into a particular prohibition.

We learn from Hutchinson's History of Massachusetts, vol. i., p. 402, that bills of credit were emitted for the first time in that colony in 1690. An army returning unexpectedly from an expedition against Canada, which had proved as disastrous as the plan was magnificent, found the government totally unprepared to meet their claims. Bills of credit were resorted to, for relief from this embarrassment. They do not appear to have been made a tender; but they were not on that account the less bills of credit, nor were they absolutely harmless. The emission, however, not being considerable, and the bills being soon redeemed, the experiment would have been productive of not much mischief, had it not been followed by repeated emissions to a much larger amount. The subsequent history of Massachusetts abounds with proofs of the evils with which paper money is fraught, whether it be or be not a legal tender.

Paper money was also issued in other colonies, both in the North and South and whether made a tender or not, was productive of evils in proportion to the quantity emitted. In the war which commenced in America in 1755, Virginia issued paper money at several successive sessions, under the appellation of treasury notes. This was made a tender. Emissions were afterwards made in 1769, in 1771, and in 1773. These were not made a tender; but they circulated together; were equally bills of credit; and were productive of the same effects. In 1775 a considerable emission was made for the purposes of the war. The bills were declared to be current but were not made a tender. In 1776 an additional emission was made, and the bills were declared to be a tender. The bills of 1775 and 1776 circulated together; were equally bills of credit; and were productive of the same consequences.

Congress emitted bills of credit to a large amount; and did not, perhaps could not, make them a legal tender. This power resided in the States. In May, 1777, the legislature of Virginia passed an act for the first time making the bills of credit issued under the authority of congress a tender so far as to extinguish interest. It was not until March, 1781, that Virginia passed an act making all the bills of credit which had been emitted by congress, and all of which had been emitted by the State, a legal tender in payment of debts. Yet they were in every sense of the word bills of credit, previous to that time; and were productive of all the consequences of paper money. We cannot then assent to the proposition, that

the history of our country furnishes any just argument in favor of that restricted construction of the constitution, for which the counsel for the defendant in error contends.

The certificates for which this note was given, being in truth "bills of credit" in the sense of the constitution, we are brought to the inquiry:—Is the note valid of which they form the consideration?

It has been long settled, that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned, that an act forbidden by the constitution of the United States, which is the supreme law, is against law. Now the constitution forbids a State to "emit bills of credit." The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan offices; but the issuing of them, the putting them into circulation, which is the act of emission, the act that is forbidden by the constitution. The consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration, is the act of emitting bills of credit, in the mode prescribed by the law of Missouri; which act is prohibited by the constitution of the United States.

Cases which we cannot distinguish from this in principle have been decided in state courts of great respectability; and in this court. . . . [Here follow statements of Springfield Bank v. Merrick et al., 14 Mass. Rep., 322; Hunt v. Knickerbocker, 5 Johns., 327, and Patton v. Nicholson, 3 Wheaton, 204.]

A majority of the court feels constrained to say that the consideration on which the note in this case was given, is against the highest law of the land, and that the note itself is utterly void. In rendering judgment for the plaintiff, the court for the State of Missouri decided in favor of the validity of a law which is repugnant to the constitution of the United States.

In the argument, we have been reminded by one side of the dignity of a sovereign State, of the humiliation of her submitting herself to this tribunal, of the dangers which may result from inflicting a wound on that dignity; by the other, of the still superior dignity of the people of the United States, who have spoken their will in terms which we cannot misunderstand.

To these admonitions, we can only answer: that if the exercise of that jurisdiction which has been imposed upon us by the constitution and laws of the United States, shall be calculated to bring on those dangers which have been indicated; or if it shall be indispensable to the preservation of the Union, and consequently

of the independence and liberty of these States; these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of law, and can tread only that path which is marked out by duty.

The judgment of the Supreme Court of the State of Missouri for the first judicial district is reversed, and the cause remanded, with directions to enter judgment for the defendants.

[JUSTICES JOHNSON, THOMPSON, and MCLEAN delivered dissenting opinions.]

JOHN BRISCOE AND OTHERS v. THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY.

11 Peters, 257. Decided 1837.

The case is stated in the opinion of the court. . . .

MCLEAN, J., delivered the opinion of the court.

This case is brought before this court, by a writ of error from the court of appeals of the State of Kentucky, under the 25th section of the Judiciary act of 1789.[1]

An action was commenced by the Bank of the Commonwealth of Kentucky, against the plaintiffs in error, in the Mercer Circuit Court of Kentucky, on a note for $2,048.37, payable to the president and directors of the bank; and the defendants filed two special pleas, in the first of which oyer was prayed of the note on which suit was brought, and they say that the plaintiff ought not to have, &c., because the note was given on the renewal of a like note, given to the said bank; and they refer to the act establishing the bank, and allege that it never received any part of the capital stock specified in the act; that the bank was authorized to issue bills of credit, on the faith of the State, in violation of the constitution of the United States. That, by various statutes, the notes issued were made receivable in discharge of executions, and if not so received, the collection of the money should be delayed, &c.; and the defendants aver that the note was given to the bank on a loan of its bills, and that the consideration, being illegal, was void.

[1] 1 Stat. at Large, 85.

The second plea presents, substantially, the same facts. To both the pleas a general demurrer was filed; and the court sustained the demurrer, and gave judgment in favor of the bank. This judgment was removed, by appeal, to the court of appeals, which is the highest court of judicature in the State, where the judgment of the circuit court was affirmed; and being brought before this court by writ of error, the question is presented whether the notes issued by the bank are bills of credit, emitted by the State, in violation of the constitution of the United States.

This cause is approached, under a full sense of its magnitude. Important as have been the great questions brought before this tribunal for investigation and decision, none have exceeded, if they have equaled, the importance of that which arises in this case. The amount of property involved in the principle is very large; but this amount, however great, could not give to the case the deep interest which is connected with its political aspect. . . .

The definition of the terms bills of credit, as used in the constitution, is the first requisite in the investigation of this subject. . . . The terms bills of credit in their mercantile sense, comprehend a great variety of evidence of debt, which circulate in a commercial country. In the early history of banks, it seems their notes were generally denominated bills of credit; but in modern times they have lost that designation; and are now called, either bank bills, or bank notes.

But the inhibition of the constitution applies to bills of credit, in a more limited sense.

It would be difficult to classify the bills of credit which were issued in the early history of this country. They were all designed to circulate as money, being issued under the laws of the respective colonies, but the forms were various in the different colonies, and often in the same colony.

In some cases they were payable with interest, in others without interest. Funds arising from certain sources of taxation were pledged for their redemption, in some instances; in others they were issued without such a pledge. They were sometimes made a legal tender, at others not. In some instances, a refusal to receive them operated as a discharge of the debt; in others, a postponement of it.

They were sometimes payable on demand; at other times, at some future period. At all times the bills were receivable for taxes, and in payment of debts due to the public; except, perhaps, in some instances, where they had become so depreciated as to be of little or no value.

These bills were frequently issued by committees, and sometimes by an officer of the government, or an individual designated for that purpose.

The bills of credit emitted by the States, during the Revolution, and prior to the adoption of the constitution, were not very dissimilar from those which the colonies had been in the practice of issuing. There were some characteristics which were common to all these bills. They were issued by the colony or State, and on its credit. For in cases where funds were pledged, the bills were to be redeemed at a future period, and gradually as the means of redemption should accumulate. In some instances, congress guaranteed the payment of bills emitted by a State.

They were, perhaps, never convertible into gold and silver, immediately on their emission; as they were issued to supply the pressing pecuniary wants of the government, their circulating as money was indispensable. The necessity which required their emission precluded the possibility of their immediate redemption.

In the case of Craig et al. v. The State of Missouri, 4 Peters, 410, this court was called upon, for the first time, to determine what constituted a bill of credit, within the meaning of the Constitution. A majority of the judges in that case, in the language of the Chief Justice, say, that "bills of credit signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society."

A definition so general as this would certainly embrace every description of paper which circulates as money.

Two of the dissenting judges, on that occasion, gave a more definite, though, perhaps, a less accurate meaning, of the terms bills of credit.

By one of them it was said, "a bill of credit may, therefore, be considered a bill drawn and resting merely on the credit of the drawer, as contradistinguished from a fund constituted or pledged for the payment of the bill." And in the opinion of the other, it is said, "to constitute a bill of credit, within the meaning of the constitution, it must be issued by a State, and its circulation, as money, enforced by statutory provisions. It must contain a promise of payment by the State generally, when no fund has been appropriated to enable the holder to convert it into money. It must be circulated on the credit of the State; not that it will be paid on presentation, but that the State, at some future period, on a time fixed or resting in its own discretion, will provide for the payment."

These definitions cover a large class of the bills of credit issued

and circulated as money, but there are classes which they do not embrace; and it is believed that no definition, short of a description of each class, would be entirely free from objection; unless it be in the general terms used by the venerable and lamented chief justice.

The definition, then, which does include all classes of bills of credit emitted by the colonies or States, is a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money.

Having arrived at this point, the next inquiry in the case is whether the notes of the Bank of the Commonwealth were bills of credit within the meaning of the constitution.

The first section of the charter provides, that the bank shall be established in the name and behalf of the commonwealth of Kentucky, under the direction of a president and twelve directors to be chosen by joint ballot of both houses of the general assembly, &c. . . . [The second section provides for the incorporation of these persons with the usual powers.] In the third section it is declared, that the stock of the bank shall be exclusively the property of the commonwealth of Kentucky, and that no individual shall own any part of it. The fourth section authorizes the president and directors to issue notes, &c.; and in the fifth section it is declared, that the capital stock shall be $2,000,000, to be paid as follows: "All moneys hereafter paid into the treasury for the purchase of the vacant land of the commonwealth; all moneys paid into the treasury for the purchase of land warrants; all moneys received for the sale of vacant lands west of the Tennessee River, and so much of the capital stock owned by the State in the Bank of Kentucky;" and as the treasurer of the State received these moneys from time to time, he was required to pay the same into the bank. . . . Certain limitations were imposed on loans to individuals, and the accommodations of the bank were to be apportioned among the different counties of the State. The president was required to make a report to each session of the legislature. The notes were to be made payable in gold and silver, and were receivable in payment of taxes and other debts due to the State. All mortgages executed to the bank, gave to it a priority. By a supplementary act it was provided that the president and directors might issue $3,000,000. In 1821, an act was passed authorizing the treasurer of the State to receive the dividends of the bank.

The notes issued by the bank were in the usual form of bank notes, in which the Bank of the Commonwealth promised to pay

to the bearer on demand the sum specified on the face of the note.

There is no evidence of any part of the capital having been paid into the bank; and as the pleas, to which the demurrers were filed, aver that no part of the capital was paid, the fact averred is admitted on the record.

It is to be regretted that any technical point arising on the pleadings should be relied on in this case, which involves principles and interests of such deep importance. Had the bank pleaded over and stated the amount actually paid into it by the State, under the charter, the ground on which it stands would have been strengthened. . . .

On the part of the plaintiffs in error, it is contended, that the provisions in the constitution that "no State shall coin money," "emit bills of credit," or "make anything but gold and silver coin a tender in payment of debts," are three distinct powers which are inhibited to the State; and that if the bills of the Bank of the Commonwealth were substantially made a tender, by an act of the legislature of Kentucky, it must be fatal to the action of the bank in this case. . . .

But the main grounds on which the counsel for the plaintiffs rely is that the Bank of the Commonwealth, in emitting the bills in question, acted as the agent of the State; and that, consequently, the bills were issued by the State. That, as a State is prohibited from issuing bills of credit, it cannot do indirectly what it is prohibited from doing directly. That the constitution intended to place the regulation of the currency under the control of the federal government; and that the act of Kentucky is not only in violation of the spirit of the constitution, but repugnant to its letter. These topics have been ably discussed at the bar and in a printed argument on behalf of the plaintiffs.

That by the constitution the currency, so far as it is composed of gold and silver, is placed under the exclusive control of congress is clear; and it is contended from the inhibition on the States to emit bills of credit, that the paper medium was intended to be made subject to the same power. If this argument be correct, and the position that a State cannot do indirectly what it is prohibited from doing directly be a sound one, then it must follow, as a necessary consequence, that all banks incorporated by a State are unconstitutional. And this, in the printed argument, is earnestly maintained, though it is admitted not to be necessary to sustain the ground assumed for the plaintiffs. The counsel of the plaintiffs, who have argued the case at the bar, do not carry the argument to this extent.

This doctrine is startling, as it strikes a fatal blow against the State banks, which have a capital of near four hundred millions of dollars, and which supply almost the entire circulating medium of the country. But let us for a moment examine it dispassionately.

The federal government is one of delegated powers. All powers not delegated to it, or inhibited to the States, are reserved to the States or to the people. A State cannot emit bills of credit; or, in other words, it cannot issue that description of paper to answer the purposes of money, which was denominated, before the adoption of the constitution, bills of credit. But a State may grant acts of incorporation for the attainment of those objects which are essential to the interests of society. This power is incident to sovereignty; and there is no limitation in the federal constitution on its exercise by the States, in respect to the incorporation of banks.

At the time the constitution was adopted, the Bank of North America, and the Massachusetts Bank, and some others, were in operation. It cannot, therefore, be supposed that the notes of these banks were intended to be inhibited by the constitution, or that they were considered as bills of credit within the meaning of that instrument. In fact, in many of their most distinguishing characteristics, they were essentially different from bills of credit, in any of the various forms in which they were issued.

If, then, the powers not delegated to the federal government, nor denied to the States, are retained by the States or the people, and by a fair construction of the terms bills of credit, as used in the constitution, they do not include ordinary bank notes, does it not follow that the power to incorporate banks to issue these notes may be exercised by a State? A uniform course of action, involving the right to the exercise of an important power by the State governments for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised. But this inquiry, though embraced in the printed argument, does not belong to the case, and is abandoned at the bar.

A State cannot do that which the federal constitution declares it shall not do. It cannot coin money. Here is an act inhibited in terms so precise that they cannot be mistaken. They are susceptible of but one construction. And it is certain that a State cannot incorporate any number of individuals, and authorize them to coin money. Such an act would be as much a violation of the constitution as if the money were coined by an officer of the State,

under its authority. The act, being prohibited, cannot be done by a State either directly or indirectly.

And the same rule applies as to the emission of bills of credit by a State. The terms used here are less specific than those which relate to coinage. Whilst no one can mistake the latter, there are great differences of opinion as to the construction of the former. If the terms in each case were equally definite and were susceptible of but one construction, there could be no more difficulty in applying the rule in the one case than in the other.

The weight of the argument is admitted, that a State cannot, by any device that may be adopted, emit bills of credit. But the question arises, what is a bill of credit within the meaning of the constitution? On the answer to this must depend the constitutionality or unconstitutionality of the act in question.

A State can act only through its agents; and it would be absurd to say that any act was not done by a State which was done by its authorized agents.

To constitute a bill of credit within the constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State; and is so received and used in the ordinary business of life.

The individual or committee who issue the bill must have the power to bind the State; they must act as agents; and of course do not incur any personal responsibility, nor impart, as individuals, any credit to the paper. These are the leading characteristics of a bill of credit, which a State cannot emit. . . .

Were these notes issued by the State?

Upon their face, they do not purport to be issued by the State, but by the president and directors of the bank. They promise to pay to bearer on demand the sums stated. Were they issued on the faith of the State? The notes contain no pledge of the faith of the State in any form. They purport to have been issued on the credit of the funds of the bank, and must have been so received in the community.

But these funds, it is said, belonged to the State; and the promise to pay on the face of the notes was made by the president and directors as agents of the State. They do not assume to act as agents, and there is no law which authorizes them to bind the State. As in, perhaps, all bank charters, they had the power to issue a certain amount of notes; but they determined the time and circumstances which should regulate these issues.

When a State emits bills of credit, the amount to be issued is

fixed by law, as also for the fund out of which they are to be paid, if any fund be pledged for their redemption; and they are issued on the credit of the State, which in some form appears upon the face of the notes, or by the signature of the person who issues them.

As to the funds of the Bank of the Commonwealth, they were, in part only, derived from the State. The capital, it is true, was to be paid by the State; but in making loans, the bank was required to take good securities; and these constituted a fund, to which the holders of the notes could look for payment, and which could be made legally responsible.

In this respect the notes of this bank were essentially different from any class of bills of credit which are believed to have been issued.

The notes were not payable in gold and silver on demand, but there was a fund, and, in all probability, a sufficient fund, to redeem them. This fund was in possession of the bank, and under the control of the president and directors. But whether the fund was adequate to the redemption of the notes issued or not, is immaterial to the present inquiry. It is enough that the fund existed, independent of the State, and was sufficient to give some degree of credit to the paper of the bank.

The question is not whether the Bank of the Commonwealth had a large capital or a small one, or whether its notes were in good credit or bad, but whether they were issued by the State, and on the faith and credit of the State. The notes were received in payment of taxes, and in discharge of all debts to the State; and this, aided by the fund arising from notes discounted, with prudent management, under favorable circumstances, might have sustained, and it is believed did sustain to a considerable extent, the credit of the bank. The notes of this bank which are still in circulation are equal in value, it is said, to specie.

But there is another quality which distinguished these notes from bills of credit. Every holder of them could not only look to the funds of the bank for payment, but he had in his power the means of enforcing it.

The bank could be sued; and the records of this court show that while its paper was depreciated, a suit was prosecuted to judgment against it by a depositor, and who obtained from the bank, it is admitted, the full amount of his judgment in specie. . . . [Here follows a description of bills issued by Maryland and South Carolina.]

If the leading properties of the notes of the Bank of the Commonwealth were essentially different from any of the numerous

classes of bills of credit, issued by the States or colonies; if they were not emitted by the State, nor upon its credit, but on the credit of the funds of the bank; if they were payable in gold and silver on demand, and the holder could sue the bank; and if to constitute a bill of credit, it must be issued by a State, and on the credit of the State, and the holder could not, by legal means, compel the payment of the bill, how can the character of these two descriptions of paper be considered as identical? They were both circulated as money; but in name, in form, and in substance, they differ.

It is insisted that the principles of this case were settled in the suit of Craig et al. v. The State of Missouri. . . .

In that case the court decided that the following paper, issued under a legislative act of Missouri, was a bill of credit within the meaning of the constitution:—

"This certificate shall be receivable at the treasury, or any of the loan offices of the State of Missouri, in the discharge of taxes or debts due to the States, in the sum of dollars, with interest for the same, at the rate of two per cent. per annum from the date." . . .

It is only necessary to compare these certificates with the notes issued by the Bank of the Commonwealth to see that no two things which have any property in common could be more unlike. They both circulated as money, and were receivable on public account; but in every other particular they were essentially different.

If to constitute a bill of credit either the form or substance of the Missouri certificate is requisite, it is clear that the notes of the Bank of the Commonwealth cannot be called bills of credit. To include both papers under one designation would confound the most important distinctions, not only as to their form and substance, but also as to their origin and effect.

There is no principle decided by the court in the case of Craig v. The State of Missouri which at all conflicts with the views here presented. Indeed the views of the court are sustained and strengthened by contrasting the present case with that one. The State of Kentucky is the exclusive stockholder in the Bank of the Commonwealth: but does this fact change the character of the corporation? Does it make the bank identical with the State? And are the operations of the bank the operations of the State? Is the bank the mere instrument of the sovereignty to effectuate its designs; and is the State responsible for its acts? The answer to these inquiries will be given in the language of this court, used

in former adjudications. . . . [Here follow extracts from Bank of the United States v. The Planters' Bank, 9 Wheat., 904, and Bank of the Commonwealth of Kentucky v. Wistar, 3 Peters, 431.]

These extracts cover almost every material point raised in this investigation. They show that a State, when it becomes a stockholder in a bank, imparts none of its attributes of sovereignty to the institution; and that this is equally the case, whether it own a whole or a part of the stock of the bank.

It is admitted by the counsel for the plaintiffs that a State may become a stockholder in a bank; but they contend that it cannot become the exclusive owner of the stock. They give no rule by which the interest of a State in such an institution shall be graduated, nor at what point the exact limit shall be fixed. May a State own one-fourth, one-half, or three-fourths of the stock? If the proper limit be exceeded, does the charter become unconstitutional; and is its constitutionality restored if the State recede within the limit? The court are as much at a loss to fix the supposed constitutional boundary of this right as the counsel can possibly be.

If the State must stop short of owning the entire stock, the precise point may surely be ascertained. It cannot be supposed that so important a constitutional principle as contended for exists without limitation. If a State may own a part of the stock of a bank, we know of no principle which prevents it from owning the whole. As a stockholder, in the language of this court, above cited, it can exercise no more power in the affairs of the corporation than is expressly given by the incorporating act. It has no more power than any other stockholder to the same extent.

This court did not consider that the character of the incorporation was at all affected by the exclusive ownership of the stock by the State. And they say that the case of the Planters' Bank presented stronger ground of defense than the suit against the Bank of the Commonwealth. That in the former the State of Georgia was not only a proprietor but a corporator; and that in the latter the president and directors constituted the corporate body. And yet in the case of the Planters' Bank the court decided the State could only be considered as an ordinary corporator, both as it regarded its powers and responsibilities.

If these positions be correct, is there not an end to this controversy? If the Bank of the Commonwealth is not the State, nor the agent of the State; if it possess no more power than is given to it in the act of incorporation; and precisely the same as

if the stock were owned by private individuals, how can it be contended that the notes of the bank can be called bills of credit in contradistinction from the notes of other banks? If, in becoming an exclusive stockholder in this bank the State imparts to it none of its attributes of sovereignty; if it holds the stock as any other stockholder would hold it, how can it be said to emit bills of credit? Is it not essential to constitute a bill of credit within the constitution that it should be emitted by a State? Under its charter the bank has no power to emit bills which have the impress of the sovereignty or which contain a pledge of its faith. It is a simple corporation, acting within the sphere of its corporate powers, and can no more transcend them than any other banking institution. The State, as a stockholder, bears the same relation to the bank as any other stockholder.

The funds of the bank and its property, of every description, are held responsible for the payment of its debts, and may be reached by legal or equitable process. In this respect, it can claim no exemption under the prerogatives of the States. And, if in the course of its operations its notes have depreciated like the notes of other banks under the pressure of circumstances, still it must stand or fall by its charter. In this its powers are defined; and its rights, and the rights of those who give credit to it, are guaranteed. And even an abuse of its powers, through which its credit has been impaired and the community injured, cannot be considered in this case.

We are of the opinion that the act incorporating the Bank of the Commonwealth was a constitutional exercise of power by the State of Kentucky, and, consequently, that the notes issued by the bank are not bills of credit within the meaning of the federal constitution. The judgment of the court of appeals is, therefore, affirmed, with interest and costs. . . .

[Mr. Justice Thompson delivered a concurring opinion, and Mr. Justice Story a dissenting one.]

HEPBURN v. GRISWOLD.

8 Wallace, 603. Decided 1870.

Error to the Court of Appeals of Kentucky, the case being this:

On the 20th of June, 1860, a certain Mrs. Hepburn made a promissory note, by which she promised to pay to Henry Gris-

wold on the 20th of February, 1862, eleven thousand two hundred and fifty "dollars."

At the time when the note was made, as also at the time when it fell due, there was, confessedly, no lawful money of the United States, or money which could lawfully be tendered in payment of private debts, but gold and silver coin.

Five days after the day when the note by its terms fell due, that is to say, on the 25th of February, 1862, in an exigent crisis of the nation, in which the government was engaged in putting down an armed rebellion of vast magnitude, Congress passed an act authorizing the issue of $150,000,000 of its own notes,[1] and enacted in regard to them, by one clause in the first section of the act, as follows:

"And such notes, herein authorized, shall be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin; and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid."

The note given by Mrs. Hepburn not being paid at maturity, interest accrued on it. And in March, 1864, suit having been brought on the note in the Louisville Chancery Court, she tendered in United States notes issued under the act mentioned $12,720, the amount of principal of the note with the interest accrued to the date of tender, and some costs in satisfaction of the plaintiff's claim. The tender was refused. The notes were then tendered and paid into court; and the chancellor, "resolving all doubts in favor of Congress," declared the tender good and adjudged the debt, interest and costs to be satisfied accordingly.

The case was then taken by Griswold to the Court of Errors of Kentucky, which reversed the chancellor's judgment, and remanded the case with instructions to enter a contrary judgment.

From the judgment of the Court of Errors of Kentucky, the case was brought by Mrs. Hepburn here. . . .

The CHIEF JUSTICE delivered the opinion of the court.

The question presented for our determination by the record in this case is, whether or not the payee or assignee of a note, made before the 25th of February, 1862, is obliged by law to

[1] For the general form of the notes, see 7 Wallace, 26.

accept in payment United States notes, equal in nominal amount to the sum due according to its terms, when tendered by the maker or other party bound to pay it? And this requires, in the first place, a construction of that clause of the first section of the act of Congress passed on that day, which declares the United States notes, the issue of which was authorized by the statute, to be a legal tender in payment of debts. The clause has already received much consideration here, and this court has held that, upon a sound construction, neither taxes imposed by State legislation,[2] nor demands upon contracts which stipulate in terms for the delivery of coin or bullion,[3] are included by legislative intention under the description of debts public and private. We are now to determine whether this description embraces debts contracted before as well as after the date of the act.

It is an established rule for the construction of statutes, that the terms employed by the legislature are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense, consonant with those principles, can be given to them. But this rule cannot prevail where the intent is clear. Except in the scarcely supposable case where a statute sets at naught the plainest precepts of morality and social obligation, courts must give effect to the clearly ascertained legislative intent, if not repugnant to the fundamental law ordained in the Constitution.

Applying the rule just stated to the act under consideration, there appears to be strong reason for construing the word debts as having reference only to debts contracted subsequent to the enactment of the law. For no one will question that the United States notes, which the act makes a legal tender in payment, are essentially unlike in nature, and, being irredeemable in coin, are necessarily unlike in value, to the lawful money intended by parties to contracts for the payment of money made before its passage. The lawful money then in use and made a legal tender in payment, consisted of gold and silver coin. The currency in use under the act, and declared by its terms to be lawful money and a legal tender, consists of notes or promises to pay impressed upon paper, prepared in convenient form for circulation, and protected against counterfeiting by suitable devices and penalties. The former possess intrinsic value, determined by the weight and fineness of the metal; the latter have no intrinsic value, but a purchasing value, determined by the quantity in circulation, by

[2] Lane County v. Oregon, 7 Wallace, 71.

[3] Bronson v. Rodes, 7 Id., 229; Butler v. Horwitz, Ib., 258.

general consent to its currency in payments, and by opinion as to the probability of redemption in coin. Both derive, in different degrees, a certain additional value from their adaptation to circulation by the form and impress given to them under national authority, and from the acts making them respectively a legal tender.

Contracts for the payment of money, made before the act of 1862, had reference to coined money, and could not be discharged, unless by consent, otherwise than by tender of the sum due in coin. Every such contract, therefore, was, in legal import, a contract for the payment of coin.

There is a well-known law of currency, that notes or promises to pay, unless made conveniently and promptly convertible into coin at the will of the holder, can never, except under unusual and abnormal conditions, be at par in circulation with coin. It is an equally well known law, that depreciation of notes must increase with the increase of the quantity put in circulation and the diminution of confidence in the ability or disposition to redeem. Their appreciation follows the reversal of these conditions. No act making them a legal tender can change materially the operation of these laws. Their force has been strikingly exemplified in the history of the United States notes. Beginning with a very slight depreciation when first issued, in March, 1862, they sank in July, 1864, to the rate of two dollars and eighty-five cents for a dollar in gold, and then rose until recently a dollar and twenty cents in paper became equal to a gold dollar.

Admitting, then, that prior contracts are within the intention of the act, and assuming that the act is warranted by the Constitution, it follows that the holder of a promissory note, made before the act, for a thousand dollars, payable, as we have just seen, according to the law and according to the intent of the parties, in coin, was required, when depreciation reached its lowest point, to accept in payment a thousand note dollars, although with the thousand coin dollars, due under the contract, he could have purchased on that day two thousand eight hundred and fifty such dollars. Every payment, since the passage of the act, of a note of earlier date, has presented similar, though less striking features.

Now, it certainly needs no argument to prove that an act, compelling acceptance in satisfaction of any other than stipulated payment, alters arbitrarily the terms of the contract, and impairs its obligation, and that the extent of impairment is in the proportion of the inequality of the payment accepted under the constraint of the law to the payment due under the contract. Nor does it

need argument to prove that the practical operation of such an act is contrary to justice and equity. It follows that no construction which attributes such practical operation to an act of Congress is to be favored, or indeed to be admitted, if any other can be reconciled with the manifest intent of the legislature.

What, then, is that manifest intent? Are we at liberty, upon a fair and reasonable construction of the act, to say that Congress meant that the word "debts" used in the act should not include debts contracted prior to its passage?

In the case of Bronson v. Rodes, we thought ourselves warranted in holding that this word, as used in the statute, does not include obligations created by express contracts for the payment of gold and silver, whether coined or in bullion. This conclusion rested, however, mainly on the terms of the act, which not only allow, but require payments in coin by or to the government, and may be fairly considered, independently of considerations belonging to the law of contracts for the delivery of specified articles, as sanctioning special private contracts for like payments; without which, indeed, the provisions relating to government payments could hardly have practical effect. This consideration, however, does not apply to the matter now before us. There is nothing in the terms of the act which looks to any difference in its operation on different descriptions of debts payable generally in money,—that is to say, in dollars and parts of a dollar. These terms, on the contrary, in their obvious import, include equally all debts not specially expressed to be payable in gold or silver, whether arising under past contracts and already due, or arising under such contracts and to become due at a future day, or arising and becoming due under subsequent contracts. A strict and literal construction indeed would, as suggested by Mr. Justice Story (1 Story on the Constitution, § 921), in respect to the same word used in the Constitution, limit the word "debts" to debts existing; and if this construction cannot be accepted because the limitation sanctioned by it cannot be reconciled with the obvious scope and purpose of the act, it is certainly conclusive against any interpretation which will exclude existing debts from its operation. The same conclusion results from the exception of interest on loans and duties on imports from the effect of the legal tender clause. This exception affords an irresistible implication that no description of debts, whenever contracted, can be withdrawn from the effect of the act if not included within the terms or the reasonable intent of the exception. And it is worthy of observation in this connection, that in all the debates to which the act gave occasion in

Congress, no suggestion was ever made that the legal tender clause did not apply as fully to contracts made before as to contracts made after its passage.

These considerations seem to us conclusive. We do not think ourselves at liberty, therefore, to say that Congress did not intend to make the notes authorized by it a legal tender in payment of debts contracted before the passage of the act.

We are thus brought to the question, whether Congress has power to make notes issued under its authority a legal tender in payment of debts, which, when contracted, were payable by law in gold and silver coin.

The delicacy and importance of this question has not been overstated in the argument. This court always approaches the consideration of questions of this nature reluctantly; and its constant rule of decision has been, and is, that acts of Congress must be regarded as constitutional, unless clearly shown to be otherwise.

But the Constitution is the fundamental law of the United States. By it the people have created a government, defined its powers, prescribed their limits, distributed them among the different departments, and directed, in general, the manner of their exercise. No department of the government has any other powers than those thus delegated to it by the people. All the legislative power granted by the Constitution belongs to Congress; but it has no legislative power which is not thus granted. And the same observation is equally true in its application to the executive and judicial powers granted respectively to the President and the courts. All these powers differ in kind, but not in source or in limitation. They all arise from the Constitution, and are limited by its terms.

It is the function of the judiciary to interpret and apply the law to cases between parties as they arise for judgment. It can only declare what the law is, and enforce by proper process the law thus declared. But, in ascertaining the respective rights of parties, it frequently becomes necessary to consult the Constitution. For there can be no law inconsistent with the fundamental law. No enactment not in pursuance of the authority conferred by it can create obligations or confer rights. For such is the express declaration of the Constitution itself in these words:

"The Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges of every State shall

be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Not every act of Congress, then, is to be regarded as the supreme law of the land; nor is it by every act of Congress that the judges are bound. This character and this force belong only to such acts as are "made in pursuance of the Constitution."

When, therefore, a case arises for judicial determination, and the decision depends on the alleged inconsistency of a legislative provision with the fundamental law, it is the plain duty of the court to compare the act with the Constitution, and if the former cannot, upon a fair construction, be reconciled with the latter, to give effect to the Constitution rather than the statute. This seems so plain that it is impossible to make it plainer by argument. If it be otherwise, the Constitution is not the supreme law; it is neither necessary or useful, in any case, to inquire whether or not any act of Congress was passed in pursuance of it; and the oath which every member of this court is required to take, that he "will administer justice without respect to persons, and do equal right to the poor and the rich, and faithfully perform the duties incumbent upon him to the best of his ability and understanding, agreeably to the Constitution and laws of the United States," becomes an idle and unmeaning form.

The case before us is one of private right. The plaintiff in the court below sought to recover of the defendants a certain sum expressed on the face of a promissory note. The defendants insisted on the right, under the act of February 25th, 1862, to acquit themselves of their obligation by tendering in payment a sum nominally equal in United States notes. But the note had been executed before the passage of the act, and the plaintiff insisted on his right under the Constitution to be paid the amount due in gold and silver. And it has not been, and cannot be, denied that the plaintiff was entitled to judgment according to his claim, unless bound by a constitutional law to accept the notes as coin.

Thus two questions were directly presented: Were the defendants relieved by the act from the obligation assumed in the contract? Could the plaintiff be compelled, by a judgment of the court, to receive in payment a currency of different nature and value from that which was in the contemplation of the parties when the contract was made?

The Court of Appeals resolved both questions in the negative, and the defendants, in the original suit, seek the reversal of that judgment by writ of error.

It becomes our duty, therefore, to determine whether the act of

February 25, 1862, so far as it makes United States notes a legal tender in payment of debts contracted prior to its passage, is constitutional and valid or otherwise. Under a deep sense of our obligation to perform this duty to the best of our ability and understanding, we shall proceed to dispose of the case presented by the record.

We have already said, and it is generally, if not universally, conceded, that the government of the United States is one of limited powers, and that no department possesses any authority not granted by the Constitution.

It is not necessary, however, in order to prove the existence of a particular authority, to show a particular and express grant. The design of the Constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and, at the same time, to mark, by sufficiently definite lines, the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers are necessarily extensive. It has been found, indeed, in the practical administration of the government, that a very large part, if not the largest part, of its functions have been performed in the exercise of powers thus implied.

But the extension of power by implication was regarded with some apprehension by the wise men who framed, and by the intelligent citizens who adopted, the Constitution. This apprehension is manifest in the terms by which the grant of incidental and auxiliary powers is made. All powers of this nature are included under the description of "power to make all laws necessary and proper for carrying into execution the powers expressly granted to Congress or vested by the Constitution in the government or in any of its departments or officers."

The same apprehension is equally apparent in the tenth article of the amendments, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or the people."

We do not mean to say that either of these constitutional provisions is to be taken as restricting any exercise of power fairly warranted by legitimate derivation from one of the enumerated or express powers. The first was undoubtedly introduced to exclude all doubt in respect to the existence of implied powers; while the words "necessary and proper" were intended to have a "sense," to use the words of Mr. Justice Story, "at once admonitory and

directory," and to require that the means used in the execution of an express power "should be bona fide appropriate to the end."[1] The second provision was intended to have a like admonitory and directory sense, and to restrain the limited government established under the Constitution from the exercise of powers not clearly delegated, or derived by just inference from powers so delegated.

It has not been maintained in argument, nor indeed, would any one, however slightly conversant with constitutional law, think of maintaining that there is in the Constitution any express grant of legislative power to make any description of credit currency a legal tender in payment of debts. We must inquire then whether this can be done in the exercise of an implied power.

The rule for determining whether a legislative enactment can be supported as an exercise of an implied power was stated by Chief Justice Marshall, speaking for the whole court, in the case of McCullough v. The State of Maryland,[2] and the statement then made has ever since been accepted as a correct exposition of the Constitution. His words were these: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." And in another part of the same opinion the practical application of this rule was thus illustrated: "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would be the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and tread on legislative ground."[3]

It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words "all laws necessary and proper for carrying into execution" powers expressly granted or vested, have, in the Constitution, a sense equivalent to that of the words, laws, not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Consti-

[1] 2 Story on the Constitution, p. 142, § 1253.

[2] 4 Wheaton, 421.

[3] 4 Wheaton, 423.

tution; laws really calculated to effect objects intrusted to the government.

The question before us, then, resolves itself into this: "Is the clause which makes United States notes a legal tender for debts contracted prior to its enactment, a law of the description stated in the rule?"

It is not doubted that the power to establish a standard of value by which all other values may be measured, or, in other words, to determine what shall be lawful money and a legal tender, is in its nature, and of necessity, a governmental power. It is in all countries exercised by the government. In the United States, so far as it relates to the precious metals, it is vested in Congress by the grant of the power to coin money. But can a power to impart these qualities to notes, or promises to pay money, when offered in discharge of pre-existing debts, be derived from the coinage power, or from any other power expressly given?

It is certainly not the same power as the power to coin money. Nor is it in any reasonable or satisfactory sense an appropriate or plainly adapted means to the exercise of that power. Nor is there more reason for saying that it is implied in, or incidental to, the power to regulate the value of coined money of the United States, or of foreign coins. This power of regulation is a power to determine the weight, purity, form, impression, and denomination of the several coins, and their relation to each other, and the relations of foreign coins to the monetary unit of the United States.

Nor is the power to make notes a legal tender the same as the power to issue notes to be used as currency. The old Congress, under the Articles of Confederation, was clothed by express grant with the power to emit bills of credit, which are in fact notes for circulation as currency; and yet that Congress was not clothed with the power to make these bills a legal tender in payment. And this court has recently held that the Congress, under the Constitution, possesses, as incidental to other powers, the same power as the old Congress to emit bills or notes; but it was expressly declared at the same time that this decision concluded nothing on the question of legal tender. Indeed, we are not aware that it has ever been claimed that the power to issue bills or notes has any identity with the power to make them a legal tender. On the contrary, the whole history of the country refutes that notion. The States have always been held to possess the power to authorize and regulate the issue of bills for circulation by banks or individuals, subject, as has been lately determined, to the control of

Congress, for the purpose of establishing and securing a National currency; and yet the States are expressly prohibited by the Constitution from making anything but gold and silver coin a legal tender. This seems decisive on the point that the power to issue notes and the power to make them a legal tender are not the same power, and that they have no necessary connection with each other.

But it has been maintained in argument that the power to make United States notes a legal tender in payment of all debts is a means appropriate and plainly adapted to the execution of the power to carry on war, of the power to regulate commerce, and of the power to borrow money. If it is, and is not prohibited, nor inconsistent with the letter or spirit of the Constitution, then the act which makes them such legal tender must be held to be constitutional.

Let us, then, first inquire whether it is an appropriate and plainly adapted means for carrying on war? The affirmative argument may be thus stated: Congress has power to declare and provide for carrying on war; Congress has also power to emit bills of credit, or circulating notes receivable for government dues, and payable, so far at least as parties are willing to receive them, in discharge of government obligations; it will facilitate the use of such notes in disbursements to make them a legal tender in payment of existing debts; therefore Congress may make such notes a legal tender.

It is difficult to say to what express power the authority to make notes a legal tender in payment of pre-existing debts may not be upheld as incidental, upon the principles of this argument. Is there any power which does not involve the use of money? And is there any doubt that Congress may issue and use bills of credit as money in the execution of any power? The power to establish post-offices and post-roads, for example, involves the collection and disbursement of a great revenue. Is not the power to make notes a legal tender as clearly incidental to this power as to the war power?

The answer to this question does not appear to us doubtful. The argument, therefore, seems to prove too much. It carries the doctrine of implied powers very far beyond any extent hitherto given to it. It asserts that whatever in any degree promotes an end within the scope of a general power, whether, in the correct sense of the word, appropriate or not, may be done in the exercise of an implied power.

Can this proposition be maintained?

It is said that this is not a question for the court deciding a

cause, but for Congress exercising the power. But the decisive answer to this is that the admission of a legislative power to determine finally what powers have the described relation as means to the execution of other powers plainly granted, and, then, to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to have that relation, would completely change the nature of American government. It would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers. It would confuse the boundaries which separate the executive and judicial from the legislative authority. It would obliterate every criterion which this court, speaking through the venerated Chief Justice in the case already cited, established for the determination of the question whether legislative acts are constitutional or unconstitutional.

Undoubtedly among means appropriate, plainly adapted, really calculated, the legislature has unrestricted choice. But there can be no implied power to use means not within the description.

Now, then, let it be considered what has actually been done in the provision of a National currency. In July and August, 1861, and February, 1862, the issue of sixty millions of dollars in United States notes, payable on demand, was authorized.[1] They were made receivable in payments, but were not declared a legal tender until March, 1862,[2] when the amount in circulation had been greatly reduced by receipt and cancellation. In 1862 and 1863[3] the issue of four hundred and fifty millions in United States notes, payable, not on demand, but, in effect, at the convenience of the government, was authorized, subject to certain restrictions as to fifty millions. These notes were made receivable for the bonds of the National loans, for all debts due to or from the United States, except duties on imports and interest on the public debt, and were also declared a legal tender. In March, 1863,[4] the issue of notes for parts of a dollar was authorized to an amount not exceeding fifty millions of dollars. These notes were not declared a legal tender, but were made redeemable under regulations to be prescribed by the Secretary of the Treasury. In February, 1863,[5] the issue of three hundred millions of dollars in notes of the National banking associations was authorized. These notes were made receivable to the same extent as United States notes,

[1] 12 Stat. at Large, 259, 313 and 338.
[2] Ib., 370.
[3] Ib., 345, 532 and 709.
[4] Ib., 711.
[5] Ib., 669.

and provision was made to secure their redemption, but they were not made a legal tender.

The several descriptions of notes have since constituted, under the various acts of Congress, the common currency of the United States. The notes which were not declared a legal tender have circulated with those which were so declared without unfavorable discrimination.

It may be added as a part of the history that other issues, bearing interest at various rates, were authorized and made a legal tender, except in redemption of bank notes, for face amount exclusive of interest. Such were the one and two years five per cent. notes and three years compound interest notes.[6] These notes never entered largely or permanently into the circulation; and there is no reason to think that their utility was increased or diminished by the act which declared them a legal tender for face amount. They need not be further considered here. They serve only to illustrate the tendency remarked by all who have investigated the subject of paper money, to increase the volume of irredeemable issues, and to extend indefinitely the application of the quality of legal tender. That it was carried no farther during the recent civil war, and has been carried no farther since, is due to circumstances, the consideration of which does not belong to this discussion.

We recur, then, to the question under consideration. No one questions the general constitutionality, and not very many, perhaps, the general expediency of the legislation by which a note currency has been authorized in recent years. The doubt is as to the power to declare a particular class of these notes to be a legal tender in payment of pre-existing debts.

The only ground upon which this power is asserted is, not that the issue of notes was an appropriate and plainly adapted means for carrying on the war, for that is admitted; but that the making of them a legal tender to the extent mentioned was such a means.

Now, we have seen that of all the notes issued those not declared a legal tender at all constituted a very large proportion, and that they circulated freely and without discount.

It may be said that their equality in circulation and credit was due to the provision made by law for the redemption of this paper in legal tender notes. But this provision, if at all useful in this respect, was of trifling importance compared with that which made them receivable for government dues. All modern history testifies

[6] 13 Id., 218, 425.

that, in time of war especially, when taxes are augmented, large loans negotiated, and heavy disbursements made, notes issued by the authority of the government, and made receivable for dues of the government, always obtain at first a ready circulation; and even when not redeemable in coin, on demand, are as little and usually less subject to depreciation than any other description of notes, for the redemption of which no better provision is made. And the history of the legislation under consideration is, that it was upon this quality of receivability, and not upon the quality of legal tender, that reliance for circulation was originally placed; for the receivability clause appears to have been in the original draft of the bill, while the legal tender clause seems to have been introduced at a later stage of its progress.

These facts certainly are not without weight as evidence that all the useful purposes of the notes would have been fully answered without making them a legal tender for pre-existing debts. It is denied, indeed, by eminent writers, that the quality of legal tender adds any thing at all to the credit or usefulness of government notes. They insist, on the contrary, that it impairs both. However this may be, it must be remembered that it is as a means to an end to be attained by the action of the government, that the implied power of making notes a legal tender in all payments is claimed under the Constitution. Now, how far is the government helped by this means? Certainly it cannot obtain new supplies or services at a cheaper rate, for no one will take the notes for more than they are worth at the time of the new contract. The price will rise in the ratio of the depreciation, and this is all that could happen if the notes were not made a legal tender. But it may be said that the depreciation will be less to him who takes them from the government, if the government will pledge to him its power to compel his creditors to receive them at par in payments. This is, as we have seen, by no means certain. If the quantity issued be excessive, and redemption uncertain and remote, great depreciation will take place; if, on the other hand, the quantiy is only adequate to the demands of business, and confidence in early redemption is strong, the notes will circulate freely whether made a legal tender or not.

But if it be admitted that some increase of availability is derived from making the notes a legal tender under new contracts, it by no means follows that any appreciable advantage is gained by compelling creditors to receive them in satisfaction of pre-existing debts. And there is abundant evidence, that whatever benefit is possible from that compulsion to some individuals or to the

government, is far more than outweighed by the losses of property, the derangement of business, the fluctuations of currency and values, and the increase of prices to the people and the government, and the long train of evils which flow from the use of irredeemable paper money. It is true that these evils are not to be attributed altogether to making it a legal tender. But this increases these evils. It certainly widens their extent and protracts their continuance.

We are unable to persuade ourselves that an expedient of this sort is an appropriate and plainly adapted means for the execution of the power to declare and carry on war. If it adds nothing to the utility of the notes, it cannot be upheld as a means to the end in furtherance of which the notes are issued. Nor can it, in our judgment, be upheld as such, if, while facilitating in some degree the circulation of the notes, it debases and injures the currency in its proper use to a much greater degree. And these considerations seem to us equally applicable to the powers to regulate commerce and to borrow money. Both powers necessarily involve the use of money by the people and by the government, but neither, as we think, carries with it as an appropriate and plainly adapted means to its exercise, the power of making circulating notes a legal tender in payment of pre-existing debts.

But there is another view, which seems to us decisive, to whatever express power the supposed implied power in question may be referred. In the rule stated by Chief Justice Marshall, the words appropriate, plainly adapted, really calculated, are qualified by the limitation that the means must be not prohibited, but consistent with the letter and spirit of the Constitution. Nothing so prohibited or inconsistent can be regarded as appropriate, or plainly adapted, or really calculated means to any end.

Let us inquire, then, first, whether making bills of credit a legal tender, to the extent indicated, is consistent with the spirit of the Constitution. Among the great cardinal principles of that instrument, no one is more conspicuous or more venerable than the establishment of justice. And what was intended by the establishment of justice in the minds of the people who ordained it is, happily, not a matter of disputation. It is not left to inference or conjecture, especially in its relations to contracts.

When the Constitution was undergoing discussion in the Convention, the Congress of the Confederation was engaged in the consideration of the ordinance for the government of the territory northwest of the Ohio,—the only territory subject at that time to its regulation and control. By this ordinance certain fundamental

articles of compact were established between the original States and the people and States of the territory, for the purpose, to use its own language, "of extending the fundamental principles of civil and religious liberty, whereon these republics" (the States united under the Confederation), "their laws and constitutions are erected." Among these fundamental principles was this: "And in the just preservation of rights and property it is understood and declared that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts or engagements bona fide and without fraud previously formed."

The same principle found more condensed expression in that most valuable provision of the Constitution of the United States, ever recognized as an efficient safeguard against injustice, that "no State shall pass any law impairing the obligation of contracts."

It is true that this prohibition is not applied in terms to the government of the United States. Congress has express power to enact bankrupt laws, and we do not say that a law made in the execution of any other express power, which, incidentally only, impairs the obligation of a contract, can be held to be unconstitutional for that reason.

But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.

Another provision, found in the fifth amendment, must be considered in this connection. We refer to that which ordains that private property shall not be taken for public use without compensation. This provision is kindred in spirit to that which forbids legislation impairing the obligation of contracts; but, unlike that, it is addressed directly and solely to the National government. It does not, in terms, prohibit legislation which appropriates the private property of one class of citizens to the use of another class; but if such property cannot be taken for the benefit of all, without compensation, it is difficult to understand how it can be so taken for the benefit of a part without violating the spirit of the prohibition.

But there is another provision in the same amendment, which,

in our judgment, cannot have its full and intended effect unless construed as a direct prohibition of the legislation which we have been considering. It is that which declares that "no person shall be deprived of life, liberty, or property, without due process of law."

It is not doubted that all the provisions of this amendment operate directly in limitation and restraint of the legislative powers conferred by the Constitution. The only question is, whether an act which compels all those who hold contracts for the payment of gold and silver money to accept in payment a currency of inferior value deprives such persons of property without due process of law.

It is quite clear, that whatever may be the operation of such an act, due process of law makes no part of it. Does it deprive any person of property? A very large proportion of the property of civilized men exists in the form of contracts. These contracts almost invariably stipulate for the payment of money. And we have already seen that contracts in the United States, prior to the act under consideration, for the payment of money, were contracts to pay the sum specified in gold and silver coin. And it is beyond doubt that the holders of these contracts were and are as fully entitled to the protection of this constitutional provision as the holders of any other description of property.

But it may be said that the holders of no description of property are protected by it from legislation which incidentally only impairs its value. And it may be urged in illustration that the holders of stock in a turnpike, a bridge, or a manufacturing corporation, or an insurance company, or a bank, cannot invoke its protection against legislation, which, by authorizing similar works or corporations, reduces its price in the market. But all this does not appear to meet the real difficulty. In the cases mentioned the injury is purely contingent and incidental. In the case we are considering it is direct and inevitable.

If in the cases mentioned the holders of the stock were required by law to convey it on demand to any one who should think fit to offer half its value for it, the analogy would be more obvious. No one probably could be found to contend that an act enforcing the acceptance of fifty or seventy-five acres of land in satisfaction of a contract to convey a hundred would not come within the prohibition against arbitrary privation of property.

We confess ourselves unable to perceive any solid distinction between such an act and an act compelling all citizens to accept, in satisfaction of all contracts for money, half or three-quarters or any other proportion less than the whole of the value actually due, according to their terms. It is difficult to conceive what act would

take private property without process of law if such an act would not.

We are obliged to conclude that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted, is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; that such an act is inconsistent with the spirit of the Constitution; and that it is prohibited by the Constitution.

It is not surprising that amid the tumult of the late civil war, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent. Some who were strongly averse to making government notes a legal tender felt themselves constrained to acquiesce in the views of the advocates of the measure. Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, and under the influence of the calmer time, reconsidered their conclusions, and now concur in those which we have just announced. These conclusions seem to us to be fully sanctioned by the letter and spirit of the Constitution.

We are obliged, therefore, to hold that the defendant in error was not bound to receive from the plaintiffs the currency tendered to him in payment of their note, made before the passage of the act of February 25, 1862. It follows that the judgment of the Court of Appeals of Kentucky must be affirmed.

It is proper to say that Mr. Justice Grier, who was a member of the court when this cause was decided in conference,[1] and when this opinion was directed to be read,[2] stated his judgment to be that the legal tender clause, properly construed, has no application to debts contracted prior to its enactment; but that upon the construction given to the act by the other judges he concurred in the opinion that the clause, so far as it makes United States notes a legal tender for such debts, is not warranted by the Constitution. *Judgment affirmed.*

[Mr. Justice Miller delivered a dissenting opinion, in which Justices Swayne and Davis concurred.]

[1] November 27, 1869. [2] January 29, 1870.

LEGAL TENDER CASES.

KNOX v. LEE. PARKER v. DAVIS.

12 Wallace, 457. Decided 1871.

These were two suits; the first a writ of error to the Circuit Court for the Western District of Texas, the second an appeal from a decree in equity in the Supreme Judicial Court of Massachusetts. . . .

Mr. Justice Strong delivered the opinion of the court.

The controlling questions in these cases are the following: Are the acts of Congress, known as the legal tender acts, constitutional when applied to contracts made before their passage; and, secondly, are they valid as applicable to debts contracted since their enactment? These questions have been elaborately argued, and they have received from the court that consideration which their great importance demands. It would be difficult to overestimate the consequences which must follow our decision. They will affect the entire business of the country, and take hold of the possible continued existence of the government. If it be held by this court that Congress has no constitutional power, under any circumstances, or in any emergency, to make treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States), the government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable, even if they were not when the acts of Congress now called in question were enacted. It is also clear that if we hold the acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice. The debts which have been contracted since February 25th, 1862, constitute, doubtless, by far the greatest portion of the existing indebtedness of the country. They have been contracted in view of the acts of Congress declaring treasury notes a legal tender, and in reliance upon that declaration. Men have bought and sold, borrowed and lent, and assumed every variety of obligations contemplating that payment might be made with such notes. Indeed, legal tender treasury notes have become the universal measures of value. If now, by our decision, it be established that these debts and obligations can

be discharged only by gold coin; if, contrary to the expectation of all parties to these contracts, legal tender notes are rendered unavailable, the government has become an instrument of the grossest injustice; all debtors are loaded with an obligation it was never contemplated they should assume; a large percentage is added to every debt, and such must become the demand for gold to satisfy contracts, that ruinous sacrifices, general distress, and bankruptcy may be expected. These consequences are too obvious to admit of question. And there is no well-founded distinction to be made between the constitutional validity of an act of Congress declaring treasury notes a legal tender for the payment of debts contracted after its passage and that of an act making them a legal tender for the discharge of all debts, as well those incurred before as those made after its enactment. There may be a difference in the effects produced by the acts, and in the hardship of their operation, but in both cases the fundamental question, that which tests the validity of the legislation, is, can Congress constitutionally give to treasury notes the character and qualities of money? Can such notes be constituted a legitimate circulating medium, having a defined legal value? If they can, then such notes must be available to fulfill all contracts (not expressly excepted) solvable in money, without reference to the time when the contracts were made. Hence it is not strange that those who hold the legal tender acts unconstitutional when applied to contracts made before February, 1862, find themselves compelled also to hold that the acts are invalid as to debts created after that time, and to hold that both classes of debts alike can be discharged only by gold and silver coin.

The consequences of which we have spoken, serious as they are, must be accepted, if there is a clear incompatibility between the Constitution and the legal tender acts. But we are unwilling to precipitate them upon the country unless such an incompatibility plainly appears. A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress—all the members of which act under the obligation of an oath of fidelity to the Constitution. Such has always been the rule. In Commonwealth v. Smith,[1] the language of the court was: "It must be remembered that, for weighty reasons, it has been assumed as a principle, in construing constitutions, by the Supreme Court of the United States, by this court, and by

[1] 4 Binney, 123.

every other court of reputation in the United States, that an act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt;" and, in Fletcher v. Peck,[2] Chief Justice Marshall said, "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt.

Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose, and so as to subserve it. In no other way can the intent of the framers of the instrument be discovered. And there are more urgent reasons for looking to the ultimate purpose in examining the powers conferred by a constitution than there are in construing a statute, a will, or a contract. We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. In Martin v. Hunter,[3] it was said, "The Constitution unavoidably deals in general language. It did not suit the purpose of the people in framing this great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution." And with singular clearness it was said by Chief Justice Marshall, in McCulloch v. The State of Maryland,[4] "A constitution, to contain an accurate detail of all subdivisions of which its great powers will admit, and of all the means by which it may be carried into execution, would partake of the prolixity of a political code, and would scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be

[2] 6 Cranch, 87.
[3] 1 Wheaton, 326.
[4] 4 Id., 405.

marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." If these are correct principles, if they are proper views of the manner in which the Constitution is to be understood, the powers conferred upon Congress must be regarded as related to each other, and all means for a common end. Each is but a part of a system, a constituent of one whole. No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object, but that object is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain a navy, are instruments for the paramount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy.

The same may be asserted also of all the non-enumerated powers included in the authority expressly given "to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in Congress, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof." It is impossible to know what those non-enumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to Congress and mentioned in detail. They embrace the execution of all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. It certainly was intended to confer upon the government the power of self-preservation. Said Chief Justice Marshall, in Cohens v. The Bank of Virginia,[5] "America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete; for all these objects it is supreme. It can then, in effecting these objects, legitimately control all individuals or governments within the American territory." He added, in the same case, "A constitution is framed for ages to come, and is designed to approach immortality as near as mortality can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if

[5] 6 Wheaton, 414.

they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it is sure to encounter." That would appear, then, to be a most unreasonable construction of the Constitution which denies to the government created by it, the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfilment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of its first article. The means or instrumentalities referred to in that clause, and authorized, are not enumerated or defined. In the nature of things enumeration and specification were impossible. But they were left to the discretion of Congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for carrying into exetion the enumerated powers given to Congress, and all other powers vested in the government of the United States, or in any department or officer thereof.

And here it is to be observed it is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions. This is well illustrated in its language respecting the writ of habeas corpus. The power to suspend the privilege of that writ is not expressly given, nor can it be deduced from any one of the particularized grants of power. Yet it is provided that the privileges of the writ shall not be suspended except in certain defined contingencies. This is no express grant of power. It is a restriction. But it shows irresistibly that somewhere in the Constitution power to suspend the privilege of the writ was granted, either by some one or more of the specifications of power, or by them all combined. And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were suggested in the conventions of the States, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the "conventions of a number of the States had, at the time

of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added." This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor reducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story, in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one. So is building a capitol or a presidential mansion, and so also is the penal code. This last is worthy of brief notice. Congress is expressly authorized "to provide for the punishment of counterfeiting the securities and current coin of the United States, and to define and punish piracies and felonies committed on the high seas and offences against the laws of nations." It is also empowered to declare the punishment of treason, and provision is made for impeachments. This is the extent of power to punish crime expressly conferred. It might be argued that the expression of these limited powers implies an exclusion of all other subjects of criminal legislation. Such is the argument in the present cases. It is said because Congress is authorized to coin money and regulate its value, it cannot declare anything other than gold and silver to be money, or make it a legal tender. Yet Congress, by the act of April 30, 1790, entitled "An act more effectually to provide for the punishment of certain crimes against the United States," and the supplementary act of March 3, 1825, defined and provided for the punishment of a large class of crimes other than those mentioned in the Constitution, and some of the punishments prescribed are manifestly not in aid of any single substantive power. No one

doubts that this was rightfully done, and the power thus exercised has been affirmed by this court in United States v. Marigold.[6] This case shows that a power may exist as an aid to the execution of an express power, or an aggregate of such powers, though there is another express power given relating in part to the same subject but less extensive. Another illustration of this may be found in connection with the provisions respecting a census. The Constitution orders an enumeration of free persons in the different States every ten years. The direction extends no further. Yet Congress has repeatedly directed an enumeration not only of free persons in the States, but of free persons in the Territories, and not only an enumeration of persons but the collection of statistics respecting age, sex, and production. Who questions the power to do this?

Indeed, the whole history of the government and of congressional legislation has exhibited the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court. This is true not only when an attempt has been made to execute a single power specifically given, but equally true when the means adopted have been appropriate to the execution, not of a single authority, but of all the powers created by the Constitution. Under the power to establish post-offices and post-roads Congress has provided for carrying the mails, punishing theft of letters and mail robberies, and even for transporting the mails to foreign countries. Under the power to regulate commerce, provision has been made by law for the improvement of harbors, the establishment of observatories, the erection of lighthouses, break-waters, and buoys, the registry, enrollment, and construction of ships, and a code has been enacted for the government of seamen. Under the same power and other powers over the revenue and the currency of the country, for the convenience of the treasury and internal commerce, a corporation known as the United States Bank was early created. To its capital the government subscribed one-fifth of its stock. But the corporation was a private one, doing business for its own profit. Its incorporation was a constitutional exercise of congressional power for no other reason than that it was deemed to be a convenient instrument or means for accomplishing one or more of the ends

[6] 9 Howard, 560.

for which the government was established, or, in the language of the first article, already quoted, "necessary and proper" for carrying into execution some or all the powers vested in the government. Clearly this necessity, if any existed, was not a direct and obvious one. Yet this court, in McCulloch v. Maryland,[7] unanimously ruled that in authorizing the bank, Congress had not transcended its powers. So debts due to the United States have been declared by acts of Congress entitled to priority of payment over debts due to other creditors, and this court has held such acts warranted by the Constitution.[8]

This is enough to show how, from the earliest period of our existence as a nation, the powers conferred by the Constitution have been construed by Congress and by this court whenever such action by Congress has been called in question. Happily the true meaning of the clause authorizing the enactment of all laws necessary and proper for carrying into execution the express powers conferred upon Congress, and all other powers vested in the government of the United States, or in any of its departments or officers, has long since been settled. In Fisher v. Blight,[9] this court, speaking by Chief Justice Marshall, said that in construing it "it would be incorrect and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose it might be said with respect to each that it was not necessary because the end might be obtained by other means." "Congress," said this court, "must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution. The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe." It was in this case, as we have already remarked, that a law giving priority to debts due to the United States was ruled to be constitutional for the reason that it appeared to Congress to be an eligible means to enable the government to pay the debts of the Union.

It was, however, in McCulloch v. Maryland that the fullest consideration was given to this clause of the Constitution granting auxiliary powers, and a construction adopted that has ever since

[7] 4 Wheaton, 416.
[8] Fisher v. Blight, 2 Cranch, 358.
[9] 2 Cranch, 358.

been accepted as determining its true meaning. . . . [Here follows a consideration of McCulloch v. Maryland.] It is hardly necessary to say that these principles are received with universal assent. Even in Hepburn v. Griswold,[10] both the majority and minority of the court concurred in accepting the doctrines of McCulloch v. Maryland as sound expositions of the Constitution, though disagreeing in their application.

With these rules of constitutional construction before us, settled at an early period in the history of the government, hitherto universally accepted, and not even now doubted, we have a safe guide to a right decision of the questions before us. Before we can hold the legal tender acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any plain degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited. This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect, or executing any of the known powers of Congress, or of any department of the government. Plainly to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times.

We do not propose to dilate at length upon the circumstances in which the country was placed, when Congress attempted to make treasury notes a legal tender. They are of too recent occurrence to justify enlarged description. Suffice it to say that a civil war was then raging which seriously threatened the overthrow of the government and the destruction of the Constitution itself. It demanded the equipment and support of large armies and navies, and the employment of money to an extent beyond the capacity of all ordinary sources of supply. Meanwhile the public treasury was nearly empty, and the credit of the government, if not stretched to its utmost tension, had become nearly exhausted. Moneyed institutions had advanced largely of their means, and more could not be expected of them. They had been compelled to suspend specie payments. Taxation was inadequate to pay even the interest on the debt already incurred, and it was impossible to await the income of additional taxes. The necessity

[10] 8 Wallace, 603.

was immediate and pressing. The army was unpaid. There was then due to the soldiers in the field nearly a score of millions of dollars. The requisitions from the War and Navy Departments for supplies exceeded fifty millions, and the current expenditure was over one million per day. The entire amount of coin in the country, including that in private hands, as well as that in banking institutions, was insufficient to supply the need of the government three months, had it all been poured into the treasury. Foreign credit we had none. We say nothing of the overhanging paralysis of trade, and of business generally, which threatened loss of confidence in the ability of the government to maintain its continued existence, and therewith the complete destruction of all remaining national credit.

It was at such a time and in such circumstances that Congress was called upon to devise means for maintaining the army and navy, for securing the large supplies of money needed, and, indeed, for the preservation of the government created by the Constitution. It was at such a time and in such an emergency that the legal tender acts were passed. Now, if it were certain that nothing else would have supplied the absolute necessities of the treasury, that nothing else would have enabled the government to maintain its armies and navy, that nothing else would have saved the government and the Constitution from destruction, while the legal tender acts would, could any one be bold enough to assert that Congress transgressed its powers? Or if these enactments did work these results, can it be maintained now that they were not for a legitimate end, or "appropriate and adapted to that end," in the language of Chief Justice Marshall? That they did work such results is not to be doubted. Something revived the drooping faith of the people; something brought immediately to the government's aid the resources of the nation, and something enabled the successful prosecution of the war, and the preservation of the national life. What was it, if not the legal tender enactments?

But if it be conceded that some other means might have been chosen for the accomplishment of these legitimate and necessary ends, the concession does not weaken the argument. It is urged now, after the lapse of nine years, and when the emergency has passed, that treasury notes without the legal tender clause might have been issued and that the necessities of the government might thus have been supplied. Hence it is inferred there was no necessity for giving to the notes issued the capability of paying private debts. At best this is mere conjecture. But admitting it to be

true, what does it prove? Nothing more than that Congress had the choice of means for a legitimate end, each appropriate, and adapted to that end, though, perhaps, in different degrees. What then? Can this court say that it ought to have adopted one rather than the other? Is it our province to decide that the means selected were beyond the constitutional power of Congress, because we may think that other means to the same ends would have been more appropriate and equally efficient? That would be to assume legislative power, and to disregard the accepted rules for construing the Constitution. The degree of the necessity for any congressional enactment, or the relative degree of its appropriateness, if it have any appropriateness, is for consideration in Congress, not here. Said Chief Justice Marshall, in McCulloch v. Maryland, as already stated, "When the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

It is plain to our view, however, that none of those measures which it is now conjectured might have been substituted for the legal tender acts could have met the exigencies of the case, at the time when those acts were passed. We have said that the credit of the government had been tried to its utmost endurance. Every new issue of notes which had nothing more to rest upon than government credit, must have paralyzed it more and more, and rendered it increasingly difficult to keep the army in the field, or the navy afloat. It is an historical fact that many persons and institutions refused to receive and pay those notes that had been issued, and even the head of the treasury represented to Congress the necessity of making the new issues legal tenders, or rather, declared it impossible to avoid the necessity. The vast body of men in the military service was composed of citizens who had left their farms, their work-shops, and their business, with families and debts to be provided for. The government could not pay them with ordinary treasury notes, nor could they discharge their debts with such a currency. Something more was needed, something that had all the uses of money. And as no one could be compelled to take common treasury notes in payment of debts, and as the prospect of ultimate redemption was remote and contingent, it is not too much to say that they must have depreciated in the market long before the war closed, as did the currency of the Confederate States. Making the notes legal tenders gave them

a new use, and it needs no argument to show that the value of things is in proportion to the uses to which they may be applied.

It may be conceded that Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the government stronger. There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution the powers created by the Constitution. But when a statute has proved effective in the execution of powers confessedly existing, it is not too much to say that it must have had some appropriateness to the execution of those powers. The rules of construction heretofore adopted, do not demand that the relationship between the means and the end shall be direct and immediate. Illustrations of this may be found in several of the cases above cited. The charter of a bank of the United States, the priority given to debts due the government over private debts, and the exemption of Federal loans from liability to State taxation, are only a few of the many which might be given. The case of Veazie Bank v. Fenno,[1] presents a suggestive illustration. There a tax of ten per cent. on State bank notes in circulation was held constitutional, not merely because it was a means of raising revenue, but as an instrument to put out of existence such a circulation in competition with notes issued by the government. There, this court, speaking through the Chief Justice, avowed that it is the constitutional right of Congress to provide a currency for the whole country; that this might be done by coin, or United States notes, or notes of National banks; and that it cannot be questioned Congress may constitutionally secure the benefit of such a currency to the people by appropriate legislation. It was said there can be no question of the power of this government to emit bills of credit; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to make them a currency uniform in value and description, and convenient and useful for circulation. Here the substantive power to tax was allowed to be employed for improving the currency. It is not easy to see why, if State bank notes can be taxed out of existence for the purposes of indirectly making United States notes more convenient and useful for commercial purposes, the same end may not be secured directly by making them a legal tender.

Concluding, then, that the provision which made treasury notes

[1] 8 Wallace, 533.

a legal tender for the payment of all debts other than those expressly excepted, was not an inappropriate means for carrying into execution the legitimate powers of the government, we proceed to inquire whether it was forbidden by the letter or spirit of the Constitution. It is not claimed that any express prohibition exists, but it is insisted that the spirit of the Constitution was violated by the enactment. Here those who assert the unconstitutionality of the acts mainly rest their argument. They claim that the clause which conferred upon Congress power "to coin money, regulate the value thereof, and of foreign coin," contains an implication that nothing but that which is the subject of coinage, nothing but the precious metals can ever be declared by law to be money, or to have the uses of money. If by this is meant that because certain powers over the currency are expressly given to Congress, all other powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the Constitution has always been construed. On the contrary it has been ruled that power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive.[2] There an express power to punish a certain class of crimes (the only direct reference to criminal legislation contained in the Constitution), was not regarded as an objection to deducing authority to punish other crimes from another substantive and defined grant of power. There are other decisions to the same effect. To assert, then, that the clause enabling Congress to coin money and regulate its value tacitly implies a denial of all other power over the currency of the nation, is an attempt to introduce a new rule of construction against the solemn decisions of this court. So far from its containing a lurking prohibition, many have thought it was intended to confer upon Congress that general power over the currency which has always been an acknowledged attribute of sovereignty in every other civilized nation than our own, especially when considered in connection with the other clause which denies to the States the power to coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. We do not assert this now, but there are some considerations touching these clauses which tend to show that if any implications are to be deduced from them, they are of an enlarging rather than a restraining character. The Constitution was intended to frame a government as

[2] United States v. Marigold, 9 Howard, 560.

distinguished from a league or compact, a government supreme in some particulars over States and people. It was designed to provide the same currency, having a uniform legal value in all the States. It was for this reason the power to coin money and regulate its value was conferred upon the Federal government, while the same power as well as the power to emit bills of credit was withdrawn from the States. The States can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated. This may indeed have been intended. Some powers that usually belong to sovereignties were extinguished, but their extinguishment was not left to inference. In most cases, if not in all, when it was intended that governmental powers, commonly acknowledged as such, should cease to exist, both in the States and in the Federal government, it was expressly denied to both, as well to the United States as to the individual States. And generally, when one of such powers was expressly denied to the States only, it was for the purpose of rendering the Federal power more complete and exclusive. . Why, then, it may be asked, if the design was to prohibit to the new government, as well as to the States, that general power over the currency which the States had when the Constitution was framed, was such denial not expressly extended to the new government, as it was to the States? In view of this it might be argued with much force that when it is considered in what brief and comprehensive terms the Constitution speaks, how sensible its framers must have been that emergencies might arise when the precious metals (then more scarce than now) might prove inadequate to the necessities of the government and the demands of the people—when it is remembered that paper money was almost exclusively in use in the States as the medium of exchange, and when the great evil sought to be remedied was the want of uniformity in the current value of money, it might be argued, we say, that the gift of power to coin money and regulate the value thereof, was understood as conveying general power over the currency, the power which had belonged to the States, and which they surrendered. Such a construction, it might be said, would be in close analogy to the mode of construing other substantive powers granted to Congress. They have never been construed literally, and the government could not exist if they were. Thus the power to carry on war is conferred by the power to "declare war." The whole system of the transportation of the mails is built upon the power to establish post-offices and post-

roads. The power to regulate commerce has also been extended far beyond the letter of the grant. Even the advocates of a strict literal construction of the phrase, "to coin money and regulate the value thereof," while insisting that it defines the material to be coined as metal, are compelled to concede to Congress large discretion in all other particulars. The Constitution does not ordain what metals may be coined, or prescribe that the legal value of the metals, when coined, shall correspond at all with their intrinsic value in the market. Nor does it even affirm that Congress may declare anything to be a legal tender for the payment of debts. Confessedly the power to regulate the value of money coined, and of foreign coins, is not exhausted by the first regulation. More than once in our history has the regulation been changed without any denial of the power of Congress to change it, and it seems to have been left to Congress to determine alike what metal shall be coined, its purity, and how far its statutory value, as money, shall corespond, from time to time, with the market value of the same metal as bullion. How then can the grant of a power to coin money and regulate its value, made in terms so liberal and unrestrained, coupled also with a denial to the States of all power over the currency, be regarded as an implied prohibition to Congress against declaring treasury notes a legal tender, if such declaration is appropriate, and adapted to carrying into execution the admitted powers of the government?

We do not, however, rest our assertion of the power of Congress to enact legal tender laws upon this grant. We assert only that the grant can, in no just sense, be regarded as containing an implied prohibition against their enactment, and that, if it raises any implications, they are of complete power over the currency, rather than restraining.

We come next to the argument much used, and, indeed, the main reliance of those who assert the unconstitutionality of the legal tender acts. It is that they are prohibited by the spirit of the Constitution because they indirectly impair the obligation of contracts. The argument, of course, relates only to those contracts which were made before February, 1862, when the first act was passed, and it has no bearing upon the question whether the acts are valid when applied to contracts made after their passage. The argument assumes two things,—first, that the acts do, in effect, impair the obligation of contracts, and second, that Congress is prohibited from taking any action which may indirectly have that effect. Neither of these assumptions can be accepted. It is true, that, under the acts, a debtor, who became

such before they were passed, may discharge his debt with the notes authorized by them, and the creditor is compellable to receive such notes in discharge of his claim. But whether the obligation of the contract is thereby weakened can be determined only after considering what was the contract obligation. It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. (We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.) The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals, but neither the expectation of one party to the contract respecting its fruits, nor the anticipation of the other constitutes its obligation. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it.[1] Were it not so the expectation of results would be always equivalent to a binding engagement that they should follow. But the obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. If there is anything settled by decision it is this, and we do not understand it to be controverted.[2] No one ever doubted that a debt of one thousand dollars, contracted before 1834, could be paid by one hundred eagles coined after that year, though they contained no more gold than ninety-four eagles such as were coined when the contract was made, and this, not because of the intrinsic value of the coin, but because of its legal value. The eagles coined after 1834 were not money until they were authorized by law, and had they been coined before, without a law fixing their legal value, they could no more have paid a debt than uncoined bullion, or cotton, or wheat. Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. Nor is this singular. A covenant for quiet enjoyment is not broken, nor is its obligation impaired by the government's taking the land granted in virtue of its right of eminent domain. The expectation of the covenantee may be disappointed. He may not enjoy all he anticipated, but the grant

[1] Apsden v. Austin, 5 Adolphus & Ellis, N. S., 671; Dunn v. Sayles, Ib., 685; Coffin v. Landis, 10 Wright, 426.

[2] Davies, 28; Barrington v. Potter, Dyer, 81, b. fol. 67; Faw v. Marsteller, 2 Cranch, 29.

was made and the covenant undertaken in subordination to the paramount right of the government.[3] We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values. Contracts for the delivery of specific articles belong exclusively to the domain of State legislation, while contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment. They are engagements to pay with lawful money of the United States, and Congress is empowered to regulate that money. It cannot, therefore, be maintained that the legal tender acts impaired the obligation of contracts.

Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless, or partially fruitless. Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. This is obliterating contracts entirely. So it may relieve parties from their aparent obligations indirectly in a multitude of ways. It may declare war, or, even in peace, pass non-intercourse acts or direct an embargo. All such measures may, and must operate seriously upon existing contracts, and may not merely hinder, but relieve the parties to such contracts entirely from performance. It is, then, clear that the powers of Congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair the obligation of contracts. And it is no sufficient answer to this to say it is true only when the powers exerted were expressly granted. There is no ground for any such distinction. It has no warrant in the Constitution, or in any of the decisions of this court. We are accustomed to speak for mere convenience of the express and implied powers conferred upon Congress. But in fact the auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as expressly given as is the power to declare war, or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list of them is made, but they are grouped in the last clause of section eight of the first article, and granted in the same words in which all other powers are granted to Congress. And this court has recognized no such distinction as is now attempted. An embargo sus-

[3] Dobbins v. Brown, 2 Jones (Pennsylvania), 75; Workman v. Mifflin, 6 Casey, 362.

pends many contracts and renders performance of others impossible, yet the power to enforce it has been declared constitutional.[4] The power to enact a law directing an embargo is one of the auxiliary powers, existing only because appropriate in time of peace to regulate commerce, or appropriate to carrying on war. Though not conferred as a substantive power, it has not been thought to be in conflict with the Constitution, because it impairs indirectly the obligation of contracts. That discovery calls for a new reading of the Constitution.

If, then, the legal tender acts were justly chargeable with impairing contract obligations, they would not, for that reason, be forbidden, unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law. But, as already intimated, the objection misapprehends the nature and extent of the contract obligation spoken of in the Constitution. As in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.

Closely allied to the objection we have just been considering is the argument pressed upon us that the legal tender acts were prohibited by the spirit of the fifth amendment, which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But who ever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? By the act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted, and about six per cent. was taken from the weight of each dollar. The effect of this was that all creditors were subjected to a corresponding loss. The debts then due became solvable with six per cent. less gold than was required to pay them before. The result was thus

[4] Gibbons v. Ogden, 9 Wheaton, 1.

precisely what it is contended the legal tender acts worked. But was it ever imagined this was taking private property without compensation or without due process of law? Was the idea ever advanced that the new regulation of gold coin was against the spirit of the fifth amendment? And has any one in good faith avowed his belief that even a law debasing the current coin, by increasing the alloy, would be taking private property? It might be impolitic and unjust, but could its constitutionality be doubted? Other statutes have, from time to time, reduced the quantity of silver in silver coin without any question of their constitutionality. It is said, however, now, that the act of 1834 only brought the legal value of gold coin more nearly into correspondence with its actual value in the market, or its relative value to silver. But we do not perceive that this varies the case or diminishes its force as an illustration. The creditor who had a thousand dollars due him on the 31st day of July, 1834 (the day before the act took effect), was entitled to a thousand dollars of coined gold of the rate and fineness of the then existing coinage. The day after, he was entitled only to a sum six per cent. less in weight and in market value, or to a smaller number of silver dollars. Yet he would have been a bold man who had asserted that, because of this, the obligation of the contract was impaired, or that private property was taken without compensation or without due process of law. No such assertion, so far as we know, was ever made. Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.

We are not aware of anything else which has been advanced in support of the proposition that the legal tender acts were forbidden by either the letter or the spirit of the Constitution. If, therefore, they were, what we have endeavored to show, appropriate means for legitimate ends, they were not transgressive of the authority vested in Congress.

Here we might stop; but we will notice briefly an argument presented in support of the position that the unit of money value must possess intrinsic value. The argument is derived from assimilating the constitutional provision respecting a standard of weights and measures to that conferring the power to coin money and regulate its value. It is said there can be no uniform standard of weights without weight, or of measure without length or space, and we are asked how anything can be made a uniform standard of value which has itself no value? This is a question foreign to the

subject before us. The legal tender acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is, that Congress has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples thereof. It is hardly correct to speak of a standard of value. The Constitution does not speak of it. It contemplates a standard for that which has gravity or extension; but value is an ideal thing. The coinage acts fix its unit as a dollar; but the gold or silver thing we call a dollar is, in no sense, a standard of a dollar. It is a representative of it. There might never have been a piece of money of the denomination of a dollar. There never was a pound sterling coined until 1815, if we except a few coins struck in the reign of Henry VIII., almost immediately debased, yet it has been the unit of British currency for many generations. It is, then, a mistake to regard the legal tender acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value.

But, without extending our remarks further, it will be seen that we hold the acts of Congress constitutional as applied to contracts made either before or after their passage. In so holding, we overrule so much of what was decided in Hepburn v. Griswold,[1] as ruled the acts unwarranted by the Constitution so far as they apply to contracts made before their enactment. That case was decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have. These cases have been heard before a full court, and they have received our most careful consideration. The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right.[2] We are not accustomed to hear them in the absence of a full court, if it can be avoided. Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error. And it is no unprecedented thing in courts of last resort, both in this country and in England, to over-

[1] 8 Wallace, 603.

[2] Briscoe v. Bank of Kentucky, 8 Peters, 118.

rule decisions previously made. We agree this should not be done inconsiderately, but in a case of such far-reaching consequences as the present, thoroughly convinced as we are that Congress has not transgressed its powers, we regard it as our duty so to decide and to affirm both these judgments.

The other questions raised in the case of Knox v. Lee were substantially decided in Texas v. White.[3]

Judgment in each case affirmed.

Mr. Justice Bradley, concurring. . . . The Constitution of the United States established a government, and not a league, compact, or partnership. . . . The United States is not only a government, but it is a National government, and the only government in this country that has the character of nationality. . . . Such being the character of the General government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions. If this proposition be not true, it certainly is true that the government of the United States has express authority, in the clause last quoted, to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the government as constituted, and vindicating its authority and existence.

Another proposition equally clear is, that at the time the Constitution was adopted, it was and had for a long time been, the practice of most, if not all, civilized governments, to employ the public credit as a means of anticipating the national revenues for the purpose of enabling them to exercise their governmental functions, and to meet the various exigencies to which all nations are subject, and that the mode of employing the public credit was various in different countries, and at different periods—sometimes by the agency of a national bank, sometimes by the issue of exchequer bills or bills of credit, and sometimes by pledges of the public domain. . . .

These precedents are cited without reference to the policy or impolicy of the several measures in the particular cases; that is always a question for the legislative discretion. They establish the historical fact that when the Constitution was adopted, the employment of bills of credit was deemed a legitimate means of meeting the exigencies of a regularly constituted government, and

[3] 7 Wallace, 700.

that the affixing to them of the quality of a legal tender was regarded as entirely discretionary with the legislature. . . .

In view, therefore, of all these facts, when we find them establishing the present government, with all the powers before rehearsed, giving to it, amongst other things, the sole control of the money of the country and expressly prohibiting the States from issuing bills of credit and from making anything but gold and silver a legal tender, and imposing no such restriction upon the General government, how can we resist the conclusion that they intended to leave to it that power unimpaired, in case the future exigencies of the nation should require its exercise? . . .

In my judgment the decrees in all the cases before us should be affirmed.

[The CHIEF JUSTICE and JUSTICES CLIFFORD and FIELD each delivered dissenting opinions. MR. JUSTICE NELSON also dissented.]

NOTE.—Compare the language of Justice Bradley with the following sentences from James Wilson's Considerations on the Power to Incorporate the Bank of North America, Works (Andrews' Edition), I., 558:

"To many purposes, the United States are to be considered as one undivided, independent nation, and as possessed of all the rights, and powers, and properties, by the law of nations incident to such. Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature."

LEGAL TENDER CASE.

JUILLIARD v. GREENMAN.

110 U. S., 421. Decided 1884.

JUILLIARD, a citizen of New York, brought an action against Greenman, a citizen of Connecticut, in the Circuit Court of the United States for the Southern District of New York, alleging that the plaintiff sold and delivered to the defendant, at his spe-

cial instance and request, one hundred bales of cotton, of the value and for the agreed price of $5,122.90; and that the defendant agreed to pay that sum in cash on the delivery of the cotton, and had not paid the same or any part thereof, except that he had paid the sum of $22.90 on account, and was now justly indebted to the plaintiff therefor in the sum of $5,100; and demanding judgment for this sum with interest and costs.

The defendant in his answer admitted the citizenship of the parties, the purchase and delivery of the cotton, and the agreement to pay therefor, as alleged; and averred that, after the delivery of the cotton, he offered and tendered to the plaintiff, in full payment, $22.50 in gold coin of the United States, forty cents in silver coin of the United States, and two United States notes, one of the denomination of $5,000, and the other of the denomination of $100, of the description known as United States legal tender notes, purporting by recital thereon to be legal tender, at their respective face values, for all debts, public and private, except duties on imports and interest on the public debt, and which after having been presented for payment, and redeemed and paid in gold coin, since January 1st, 1879, at the United States sub-treasury in New York, had been reissued and kept in circulation under and in pursuance of the act of Congress of May 31st, 1878, ch. 146; that at the time of offering and tendering these notes and coin to the plaintiff, the sum of $5,122.90 was the entire amount due and owing in payment for the cotton, but the plaintiff declined to receive the notes in payment of $5,100 thereof; and that the defendant had ever since remained, and still was, ready and willing to pay to the plaintiff the sum of $5,100 in these notes, and brought these notes into court ready to be paid to the plaintiff, if he would accept them.

The plaintiff demurred to the answer, upon the grounds that the defense, consisting of new matter, was insufficient in law upon its face, and that the facts stated in the answer did not constitute any defense to the cause of action alleged.

The Circuit Court overruled the demurrer and gave judgment for the defendant, and the plaintiff sued out this writ of error.

. . .

Mr. Justice Gray delivered the opinion of the court.

The amount which the plaintiff seeks to recover, and which, if the tender pleaded is insufficient in law, he is entitled to recover, is $5,100. There can, therefore, be no doubt of the jurisdiction

of this court to revise the judgment of the Circuit Court. Act of February 16th, 1875, ch. 77, § 3; 18 Stat., 315.

The notes of the United States, tendered in payment of the defendant's debt to the plaintiff, were originally issued under the acts of Congress of February 25th, 1862, ch. 33, July 11th, 1862, ch. 142, and March 3d, 1863, ch. 73, passed during the war of the rebellion, and enacting that these notes should "be lawful money and a legal tender in payment of all debts, public and private, within the United States," except for duties on imports and interest on the public debt. 12 Stat., 345, 532, 709.

The provisions of the earlier acts of Congress, so far as it is necessary, for the understanding of the recent statutes, to quote them, are re-enacted in the following provisions of the Revised Statutes:—

"Sec. 3579. When any United States notes are returned to the Treasury, they may be reissued, from time to time, as the exigencies of the public interest may require.

"Sec. 3580. When any United States notes returned to the Treasury are so mutilated or otherwise injured as to be unfit for use, the Secretary of the Treasury is authorized to replace the same with others of the same character and amounts.

"Sec. 3581. Mutilated United States notes, when replaced according to law, and all other notes which by law are required to be taken up and not reissued, when taken up shall be destroyed in such manner and under such regulations as the Secretary of the Treasury may prescribe.

"Sec. 3582. The authority given to the Secretary of the Treasury to make any reduction of the currency, by retiring and cancelling United States notes, is suspended."

"Sec. 3588. United States notes shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, except for duties on imports and interest on the public debt."

The act of January 14th, 1875, ch. 15, "to provide for the resumption of specie payments," enacted that on and after January 1st, 1879, "the Secretary of the Treasury shall redeem in coin the United States legal tender notes then outstanding, on their presentation for redemption at the office of the Assistant Treasurer of the United States in the City of New York, in sums of not less than fifty dollars," and authorized him to use for that purpose any surplus revenues in the Treasury and the proceeds of the sales of certain bonds of the United States. 18 Stat., 296.

The act of May 31st, 1878, ch. 146, under which the notes in question were reissued, is entitled "An act to forbid the further retirement of United States legal tender notes," and enacts as follows:—

"From and after the passage of this act it shall not be lawful for the Secretary of the Treasury or other officer under him to cancel or retire any more of the United States legal tender notes. And when any of said notes may be redeemed or be received into the Treasury under any law from any source whatever and shall belong to the United States, they shall not be retired, cancelled, or destroyed, but they shall be reissued and paid out again and kept in circulation: Provided, That nothing herein shall prohibit the cancellation and destruction of mutilated notes and the issue of other notes of like denomination in their stead, as now provided by law. All acts and parts of acts in conflict herewith are hereby repealed." 20 Stat., 87.

The manifest intention of this act is that the notes which it directs, after having been redeemed, to be reissued and kept in circulation, shall retain their original quality of being a legal tender.

The single question, therefore, to be considered, and upon the answer to which the judgment to be rendered between these parties depends, is whether notes of the United States, issued in time of war, under acts of Congress declaring them to be a legal tender in payment of private debts, and afterwards in time of peace redeemed and paid in gold coin at the Treasury, and then reissued under the act of 1878, can, under the Constitution of the United States, be a legal tender in payment of such debts.

Upon full consideration of the case, the court is unanimously of opinion that it cannot be distinguished in principle from the cases heretofore determined, reported under the names of the Legal Tender Cases, 12 Wall., 457; Dooley v. Smith, 13 Wall., 604; Railroad Company v. Johnson, 15 Wall., 195; and Maryland v. Railroad Company, 22 Wall., 105; and all the judges, except Mr. Justice Field, who adheres to the views expressed in his dissenting opinions in those cases, are of opinion that they were rightly decided.

The elaborate printed briefs submitted by counsel in this case, and the opinions delivered in the Legal Tender Cases, and in the earlier case of Hepburn v. Griswold, 8 Wall., 603, which those cases overruled, forcibly present the arguments on either side of the question of the power of Congress to make the notes of the United States a legal tender in payment of private debts. With-

out undertaking to deal with all those arguments, the court has thought it fit that the grounds of its judgment in the case at bar should be fully stated.

No question of the scope and extent of the implied powers of Congress under the Constitution can be satisfactorily discussed without repeating much of the reasoning of Chief Justice Marshall in the great judgment in McCulloch v. Maryland, 4 Wheat., 316, by which the power of Congress to incorporate a bank was demonstrated and affirmed, notwithstanding the Constitution does not enumerate, among the powers granted, that of establishing a bank or creating a corporation.

The people of the United States by the Constitution established a national government, with sovereign powers, legislative, executive, and judicial. "The government of the Union," said Chief Justice Marshall, "though limited in its powers, is supreme within its sphere of action;" "and its laws, when made in pursuance of the Constitution, form the supreme law of the land." "Among the enumerated powers of government, we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government." 4 Wheat., 405, 406, 407.

A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. The Constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the national legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution. Chief Justice Marshall, after dwelling upon this view, as required by the very nature of the Constitution, by the language in which it is framed, by the limitations upon the general powers of Congress introduced in the ninth section of the first article, and by the omission to use any restrictive term which might prevent its receiving a fair and just interpretation, added these emphatic words: "In considering this question, then, we must never forget that it is a constitution we are expounding." 4 Wheat., 107. See also page 415.

The breadth and comprehensiveness of the words of the Con-

stitution are nowhere more strikingly exhibited than in regard to the powers over the subjects of revenue, finance, and currency, of which there is no other express grant than may be found in these few brief clauses:—

"The Congress shall have power

"To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

"To borrow money on the credit of the United States;

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

"To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures."

The section which contains the grant of these and other principal legislative powers concludes by declaring that the Congress shall have power

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

By the settled construction and the only reasonable interpretation of this clause, the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it.

That clause of the Constitution which declares that "the Congress shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States," either embodies a grant of power to pay the debts of the United States, or presupposes and assumes that power as inherent in the United States as a sovereign government. But, in whichever aspect it be considered, neither this nor any other clause of the Constitution makes any mention of priority or preference of the United States as a creditor over other creditors of an individual debtor. Yet this court, in the early case of United States v. Fisher, 2 Cranch, 358, held that, under the power to pay the debts of the United States, Congress had the power to enact that debts due to the United States should have that priority of payment out of the estate of an insolvent debtor, which the law of England gave to debts due the Crown.

In delivering judgment in that case, Chief Justice Marshall expounded the clause giving Congress power to make all necessary and proper laws, as follows: "In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution. The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself the most eligible to effect that object." 2 Cranch, 396.

In McCulloch v. Maryland, he more fully developed the same view, concluding thus: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." 4 Wheat., 421.

The rule of interpretation thus laid down has been constantly adhered to and acted on by this court, and was accepted as expressing the true test by all the judges who took part in the former discussions of the power of Congress to make the treasury notes of the United States a legal tender in payment of private debts.

The other judgments delivered by Chief Justice Marshall contain nothing adverse to the power of Congress to issue legal tender notes.

By the Articles of Confederation of 1777, the United States in Congress assembled were authorized "to borrow money or emit bills on the credit of the United States;" but it was declared that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled." Art. 2; art. 9, § 5; 1 Stat., 4, 7. Yet, upon the question

whether, under those articles, Congress, by virtue of the power to emit bills on the credit of the United States, had the power to make bills so emitted a legal tender, Chief Justice Marshall spoke very guardedly, saying: "Congress emitted bills of credit to a large amount, and did not, perhaps could not, make them a legal tender. This power resided in the States." Craig v. Missouri, 4 Pet., 410, 435. But in the Constitution, as he had before observed in McCulloch v. Maryland, "there is no phrase which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only that the powers 'not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;' thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments." 4 Wheat., 406, 407.

The sentence sometimes quoted from his opinion in Sturges v. Crowninshield had exclusive relation to the restrictions imposed by the Constitution on the powers of the States, and especial reference to the effect of the clause prohibiting the States from passing laws impairing the obligation of contracts, as will clearly appear by quoting the whole paragraph: "Was this general prohibition intended to prevent paper money? We are not allowed to say so, because it is expressly provided that no State shall 'emit bills of credit;' neither could these words be intended to restrain the States from enabling debtors to discharge their debts by the tender of property of no real value to the creditor, because for that subject also particular provision is made. Nothing but gold and silver coin can be made a tender in payment of debts." 4 Wheat., 122, 204.

Such reports as have come down to us of the debates in the Convention that framed the Constitution afford no proof of any general concurrence of opinion upon the subject before us. The adoption of the motion to strike out the words "and emit bills" from the clause "to borrow money and emit bills on the credit of the United States" is quite inconclusive. The philippic delivered

before the Assembly of Maryland by Mr. Martin, one of the delegates from that State, who voted against the motion, and who declined to sign the Constitution, can hardly be accepted as satisfactory evidence of the reasons or the motives of the majority of the Convention. See 1 Elliot's Debates, 345, 370, 376. Some of the members of the Convention, indeed, as appears by Mr. Madison's minutes of the debates, expressed the strongest opposition to paper money. And Mr. Madison has disclosed the grounds of his own action, by recording that "this vote in the affirmative by Virginia was occasioned by the acquiescence of Mr. Madison, who became satisfied that striking out the words would not disable the government from the use of public notes, so far as they could be safe and proper; and would only cut off the pretext for a paper currency, and particularly for making the bills a tender, either for public or private debts." But he has not explained why he thought that striking out the words "and emit bills" would leave the power to emit bills, and deny the power to make them a tender in payment of debts. And it cannot be known how many of the other delegates, by whose vote the motion was adopted, intended neither to proclaim nor to deny the power to emit paper money, and were influenced by the argument of Mr. Gorham, who "was for striking out, without inserting any prohibition," and who said: "If the words stand, they may suggest and lead to the emission." "The power, so far as it will be necessary or safe, will be involved in that of borrowing." 5 Elliot's Debates, 434, 435, and note. And after the first clause of the tenth section of the first article had been reported in the form in which it now stands, forbidding the States to make anything but gold or silver coin a tender in payment of debts, or to pass any law impairing the obligation of contracts, when Mr. Gerry, as reported by Mr. Madison, "entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the States from impairing the obligation of contracts, alleging that Congress ought to be laid under the like prohibitions," and made a motion to that effect, he was not seconded. Ib., 546. As an illustration of the danger of giving too much weight, upon such a question, to the debates and the votes in the Convention, it may also be observed that propositions to authorize Congress to grant charters of incorporation for national objects were strongly opposed, especially as regarded banks, and defeated. Ib., 440, 543, 544. The power of Congress to emit bills of credit, as well as to incorporate national banks, is now clearly established by decisions to which we shall presently refer.

The words "to borrow money," as used in the Constitution, to designate a power vested in the national government, for the safety and welfare of the whole people, are not to receive that limited and restricted interpretation and meaning which they would have in a penal statute, or in an authority conferred, by law or by contract, upon trustees or agents for private purposes.

The power "to borrow money on the credit of the United States" is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the government. It includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form, of stock, bonds, bills, or notes; and in whatever form they are issued, being instruments of the national government, they are exempt from taxation by the governments of the several States. Weston v. Charleston City Council, 2 Pet., 449; Banks v. Mayor, 7 Wall., 16; Bank v. Supervisors, 7 Wall., 26. Congress has authority to issue these obligations in a form adapted to circulation from hand to hand in the ordinary transactions of commerce and business. In order to promote and facilitate such circulation, to adapt them to use as currency, and to make them more current in the market, it may provide for their redemption in coin or bonds, and may make them receivable in payment of debts to the government. So much is settled beyond doubt, and was asserted or distinctly admitted by the judges who dissented from the decision in the Legal Tender Cases, as well as by those who concurred in that decision. Veazie Bank v. Fenno, 8 Wall., 533, 548; Hepburn v. Griswold, 8 Wall., 616, 636; Legal Tender Cases, 12 Wall., 543, 544, 560, 582, 610, 613, 637.

It is equally well settled that Congress has the power to incorporate national banks, with the capacity, for their own profit as well as for the use of the government in its money transactions, of issuing bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which, when so current, the law has always recognized as a good tender in payment of money debts, unless specifically objected to at the time of the tender. United States Bank v. Bank of Georgia, 10 Wheat., 333, 347; Ward v. Smith, 7 Wall., 447, 451. The power of Congress to charter a bank was maintained in McCulloch v. Maryland, 4 Wheat., 316, and in Osborn v. United States Bank, 9 Wheat., 738, chiefly upon the ground that it was an appropriate means for carrying on the money transactions of the government. But Chief Justice Marshall said: "The currency which it circulates,

by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government than it could otherwise be; and if this be true, the capacity to carry on this trade is a faculty indispensable to the character and objects of the institution." 9 Wheat., 864. And Mr. Justice Johnson, who concurred with the rest of the court in upholding the power to incorporate a bank, gave the further reason that it tended to give effect to "that power over the currency of the country, which the framers of the Constitution evidently intended to give to Congress alone." Ib., 873.

The constitutional authority of Congress to provide a currency for the whole country is now firmly established. In Veazie Bank v. Fenno, 8 Wall., 533, 548, Chief Justice Chase, in delivering the opinion of the court, said: "It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit." Congress, having undertaken to supply a national currency, consisting of coin, of treasury notes of the United States, and of the bills of national banks, is authorized to impose on all State banks, or national banks, or private bankers, paying out the notes of individuals or of State banks, a tax of ten per cent. upon the amount of such notes so paid out. Veazie Bank v. Fenno, above cited; National Bank v. United States, 101 U. S., 1. The reason for this conclusion was stated by Chief Justice Chase, and repeated by the present Chief Justice, in these words: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile." 8 Wall., 549; 101 U. S., 6.

By the Constitution of the United States, the several States are prohibited from coining money, emitting bills of credit, or making anything but gold and silver coin a tender in payment of debts. But no intention can be inferred from this to deny to Congress either of these powers. Most of the powers granted to Congress are described in the eighth section of the first article; the

limitations intended to be set to its powers, so as to exclude certain things which might otherwise be taken to be included in the general grant, are defined in the ninth section; the tenth section is addressed to the States only. This section prohibits the States from doing some things which the United States are expressly prohibited from doing, as well as from doing some things which the United States are expressly authorized to do, and from doing some things which are neither expressly granted nor expressly denied to the United States. Congress and the States equally are expressly prohibited from passing any bill of attainder or ex post facto law, or granting any title of nobility. The States are forbidden, while the President and Senate are expressly authorized, to make treaties. The States are forbidden, but Congress is expressly authorized to coin money. The States are prohibited from emitting bills of credit; but Congress, which is neither expressly authorized nor expressly forbidden to do so, has, as we have already seen, been held to have the power of emitting bills of credit, and of making every provision for their circulation as currency, short of giving them the quality of legal tender for private debts—even by those who have denied its authority to give them this quality.

It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. This power has been distinctly recognized in an important modern case, ably argued and fully considered, in which the Emperor of Austria, as King of Hungary, obtained from the English Court of Chancery an injunction against the issue in England, without his license, of notes purporting to be public paper money of Hungary. Austria v. Day, 2 Giff., 628, and 3 D. F. & J., 217. The power of issuing bills of credit, and making them, at the discretion of the legislature, a

tender in payment of private debts, had long been exercised in this country by the several Colonies and States; and during the Revolutionary War the States, upon the recommendation of the Congress of the Confederation, had made the bills issued by Congress a legal tender. See Craig v. Missouri, 4 Pet., 435, 453; Briscoe v. Bank of Kentucky, 11 Pet., 257, 313, 334-336; Legal Tender Cases, 12 Wall., 557, 558, 622; Phillips on American Paper Currency, passim. The exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States.

This position is fortified by the fact that Congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.

The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If, upon a just and fair interpretation of the whole Constitution, a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected. The decisions of this court, already cited, afford several examples of this.

Upon the issue of stock, bonds, bills, or notes of the United States, the States are deprived of their power of taxation to the extent of the property invested by individuals in such obligations, and the burden of State taxation upon other private property is correspondingly increased. The ten per cent. tax, imposed by Congress on notes of State banks and of private bankers, not only lessens the value of such notes, but tends to drive them, and all State banks of issue, out of existence. The priority given to debts due to the United States over the private debts of an insolvent

debtor diminishes the value of these debts, and the amount which their holders may receive out of the debtor's estate.

So, under the power to coin money and to regulate its value, Congress may (as it did with regard to gold by the act of June 28th, 1834, c. 95, and with regard to silver by the act of February 28th, 1878, c. 20), issue coins of the same denominations as those already current by law, but of less intrinsic value than those, by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by the payment of coins of the less real value. A contract to pay a certain sum in money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made. 1 Hale P. C., 192-194; Bac. Ab. Tender, B. 2; Pothier, Contract of Sale, No. 416; Pardessus, Droit Commercial, Nos. 204, 205; Searight v. Calbraith, 4 Dall., 324. As observed by Mr. Justice Strong, in delivering the opinion of the court in the Legal Tender Cases, "Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power." 12 Wall., 549.

Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution, "to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the United States," and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin;" and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, "necessary and proper for carrying into execution the pow-

ers vested by this Constitution in the government of the United States."

Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts. To quote once more from the judgment in McCulloch v. Maryland: "Where the law is not prohibited, and is really calculated to effect any one of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." 4 Wheat., 423.

It follows that the act of May 31st, 1878, c. 146, is constitutional and valid; and that the Circuit Court rightly held that the tender in treasury notes, reissued and kept in circulation under that act, was a tender of lawful money in payment of the defendant's debt to the plaintiff. *Judgment affirmed.*

[MR. JUSTICE FIELD delivered a dissenting opinion.]

NOTE.—See articles in American Law Review, IV., 768, by Justice O. W. Holmes, and in Harvard Law Review, I., 73, by Prof. James B. Thayer.

IV. COMMERCE.

GIBBONS v. OGDEN.

9 Wheaton, 1. Decided 1824.

ERROR to the court for the trial of impeachments and correction of errors of the State of New York. Aaron Ogden filed his bill in the court of chancery of that State, against Thomas Gibbons, setting forth the several acts of the legislature thereof, enacted for the purpose of securing to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years which has not yet expired; and authorizing the chancellor to award an injunction, restraining any person whatever from navigating those waters with boats of that description. The bill stated an assignment from Livingston and Fulton to one John R. Livingston, and from him to the complainant, Ogden, of the right to navigate the waters between Elizabethtown, and other places in New Jersey, and the city of New York; and that Gibbons, the defendant below, was in possession of two steamboats, called The Stoudinger and The Bellona, which were actually employed in running between New York and Elizabethtown, in violation of the exclusive privilege conferred on the complainant, and praying an injunction to restrain the said Gibbons from using the said boats, or any other propelled by fire or steam, in navigating the waters within the territory of New York. The injunction having been awarded, the answer of Gibbons was filed, in which he stated that the boats employed by him were duly enrolled and licensed, to be employed in carrying on the coasting trade, under the act of congress, passed the 18th of February, 1793, c. 8 (1 Stats. at Large, 305), entitled, "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." And the defendant insisted on his right, in virtue of such licenses, to navigate the waters between Elizabethtown and the city of New York, the said acts of the legislature

of the State of New York to the contrary notwithstanding. At the hearing, the chancellor perpetuated the injunction, being of the opinion that the said acts were not repugnant to the constitution and laws of the United States, and were valid. This decree was affirmed in the court for the trial of impeachments and correction of errors, which is the highest court of law and equity in the State, before which the cause could be carried, and it was thereupon brought to this court by writ of error. . . .

MARSHALL, C. J., delivered the opinion of the court, and, after stating the case, proceeded as follows:—

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains are repugnant to the constitution and laws of the United States. They are said to be repugnant,—

1. To that clause in the constitution which authorizes congress to regulate commerce.

2. To that which authorizes congress to promote the progress of science and useful arts.

The State of New York maintains the constitutionality of these laws; and their legislature, their council of revision, and their judges, have repeatedly concurred in this opinion. It is supported by great names,—by names which have all the titles to consideration that virtue, intelligence, and office can bestow. No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government.

As preliminary to the very able discussions of the constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns, converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature; empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be

determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so constructed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an

investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.

The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more,—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the con-

stitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself. It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted,—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united in that construction which comprehends navigation in the word "commerce." Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade. That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case an embargo is no more a war measure than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen.

When congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce and the avoiding

of war. By its friends and its enemies it was treated as a commercial, not as a war, measure. The persevering earnestness and zeal with which it was opposed, in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility, will not be imputed to those who were arrayed in opposition to this. Yet they never suspected that navigation was no branch of trade, and was, therefore, not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation, of commerce. In terms, they admitted the applicability of the words used in the constitution to vessels; and that, in a case which produced a degree and an extent of excitement calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on this subject.

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes." It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the ex-

ternal boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

This principle is, if possible, still more clear when applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie

between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining States commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a State . The power of congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods by land between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry, what is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness that, although the

power of congress to regulate commerce with foreign nations, and among the several States, be co-extensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the States may severally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the States are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not in its nature incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the States to

tax for the support of their own governments; nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to congress, or is retained until congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which congress deemed it proper to make are now in full operation. The sole question is, can a State regulate commerce with foreign nations and among the States while congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th section as supporting their opinion. . . .

These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution as being passed in the exercise of a power remaining with the States.

That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to a general government; all which can be most advantageously exercised by the States themselves. In-

spection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

No direct general power over these objects is granted to congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers,—that, for example, of regulating commerce with foreign nations and among the States,—may use means that may also be employed by a State in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. If congress license vessels to sail from one port to another in the same State, the act is supposed to be necessarily incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police. So if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

The acts of congress, passed in 1796 and 1799,[1] empowering and directing the officers of the general government to conform to, and assist in, the execution of the quarantine and health laws of a State, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a State may rightfully regulate commerce with foreign nations, or among the States; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of congress, and are considered as flowing from the acknowledged power of a State to provide for the health of its citizens. But as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with, and be affected by, the laws of the United States made for the regulation of commerce, congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object by making provisions in aid of those of the States. But in making these provisions the opinion is unequivocally manifested that congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce.

The act passed in 1803,[2] prohibiting the importation of slaves into any State which shall itself prohibit their importation, implies, it is said, an admission that the States possessed the power to exclude or admit them; from which it is inferred that they possess the same power with respect to other articles.

If this inference were correct; if this power was exercised, not under any particular clause in the constitution, but in virtue of a general right over the subject of commerce, to exist as long as the constitution itself,—it might now be exercised. Any State might now import African slaves into its own territory. But it is obvious that the power of the States over this subject, previous to the year 1808, constitutes an exception to the power of congress to regulate commerce, and the exception is expressed in such words as to manifest clearly the intention to continue the pre-existing right of the States to admit or exclude for a limited pe-

[1] 1 Stats. at Large, 474, 619. [2] 3 Stats. at Large, p. 529.

riod. The words are, "the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the congress prior to the year 1808." The whole object of the exception is, to preserve the power to those States which might be disposed to exercise it; and its language seems to the court to convey this idea unequivocally. The possession of this particular power, then, during the time limited in the constitution, cannot be admitted to prove the possession of any other similar power.

It has been said that the act of August 7, 1789,[3] acknowledges a concurrent power in the States to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with congress to regulate commerce with foreign nations and amongst the States. But this inference is not, we think, justified by the fact. Although congress cannot enable a State to legislate, congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future presupposes the right in the maker to legislate on the subject.

The act unquestionably manifests an intention to leave this subject entirely to the States until congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things unless expressly applied to it by congress. But this section is confined to pilots within the "bays, inlets, rivers, harbors, and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular State. The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent; and the adoption of its system by congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the States so to apply it of their own authority. But the adoption of the State system being temporary, being only "until further legislative provision shall be made by congress," shows conclusively an opinion that congress could control the whole subject, and might adopt the system of the States, or provide one of its own.

[3] 1 Stats. at Large, 54.

A State, it is said, or even a private citizen, may construct lighthouses. But gentlemen must be aware that if this proves a power in a State to regulate commerce, it proves that the same power is in the citizen. States, or individuals who own lands, may, if not forbidden by law, erect on those lands what buildings they please; but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained if exercised so as to produce a public mischief.

These acts were cited at the bar for the purpose of showing an opinion in congress that the States possess, concurrently with the legislature of the Union, the power to regulate commerce with foreign nations and among the States. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the States retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to congress.

It has been contended by the counsel for the appellant that, as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress, and

the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. . . .

In pursuing this inquiry at the bar, it has been said that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to congress the power to regulate it. In the exercise of this power, congress has passed "An act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise.

It will at once occur that when a legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone if the right itself be annihilated. It would be contrary to all reason and to the course of human affairs to say that a State is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself; that the State of New York cannot prevent an enrolled and licensed vessel proceeding from Elizabethtown, in New Jersey, to New York, from enjoying, in her course and on her entrance into port, all the privileges conferred by the act of congress, but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another State. To the court it seems very clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies unequivocally an authority to licensed vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject.

The first section declares that vessels enrolled by virtue of a previous law, and certain other vessels, enrolled as described in that act, and having a license in force, as is by the act required, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

This section seems to the court to contain a positive enactment that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges

cannot be separated from the trade, and cannot be enjoyed unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act.

The 4th section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade;" and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, "license is hereby granted for the said steamboat Bellona to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer; they are the words of the legislature; and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act than in the license itself.

The word "license" means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license. Would the validity or effect of such an instrument be questioned by the respondent if executed by persons claiming regularly under the laws of New York?

The license must be understood to be what it purports to be,—a legislative authority to the steamboat Bellona "to be employed in carrying on the coasting trade for one year from this date."

It has been denied that these words authorize a voyage from New Jersey to New York. It is true that no ports are specified; but it is equally true that the words used are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it; and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of those operations.

Notwithstanding the decided language of the license, it has

also been maintained that it gives no right to trade, and that its sole purpose is to confer the American character.

The answer given to this argument, that the American character is conferred by the enrollment and not by the license, is, we think, founded too clearly in the words of the law to require the support of any additional observations. The enrollment of vessels designed for the coasting trade corresponds precisely with the registration of vessels designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burden of twenty tons and upwards, and requires no circumstance essential to the American character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do; that is, to give permission to a vessel already proved by her enrollment to be American to carry on the coasting trade.

But if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers, and this is no part of that commerce which congress may regulate.

If, as our whole course of legislation on this subject shows, the power of congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument to prove that the construction is correct; and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government, which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen and respecting ownership, are as applicable to vessels carrying men as to vessels carrying manufactures; and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar rests on the foundation that the power of congress does not extend to navigation as a branch of commerce, and can only be applied to that subject incidentally and occasionally.

But if that foundation be removed, we must show some plain, intelligible distinction, supported by the constitution, or by reason, for discriminating between the power of congress over vessels employed in navigating the same seas. We can perceive no such distinction.

If we refer to the constitution, the inference to be drawn from it is rather against the distinction. The section which restrains congress from prohibiting the migration or importation of such persons as any of the States may think proper to admit, until the year 1808, has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary arrivals; and so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men who pass from place to place voluntarily, and to those who pass involuntarily.

If the power reside in congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed, to a greater or less extent, in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them.

The Duty Act, sections 23 and 46,[1] contains provisions respecting passengers, and shows that vessels which transport them have the same rights, and must perform the same duties, with other vessels. They are governed by the general laws of navigation.

In the progress of things, this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business within those provisions which were intended for vessels generally; and on the 2d of March, 1819, passed "An act regulating passenger ships and vessels."[2] This wise and humane law provides for the safety and

[1] 1 Stats. at Large, 644, 661.

[2] 3 Stats. at Large, 488.

comfort of passengers, and for the communication of everything concerning them which may interest the government, to the department of State, but makes no provision concerning the entry of the vessel, or her conduct in the waters of the United States. This, we think, shows conclusively the sense of congress (if, indeed, any evidence to that point could be required), that the pre-existing regulations comprehended passenger ships among others; and in prescribing the same duties, the legislature must have considered them as possessing the same rights.

If, then, it were even true, that The Bellona and The Stoudinger were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question in the case before the court. The laws of New York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New York are closed against them, though their cargoes be dutiable goods, which the laws of the United States permit them to enter and deliver in New York. If by the latter, those waters are free to them, though they should carry passengers only. In conformity with the law, is the bill of the plaintiff in the state court. The bill does not complain that The Bellona and The Stoudinger carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege, specially, that those vessels were employed in the transportation of passengers, but says, generally, that they were employed "in the transportation of passengers, or otherwise." The answer avers only that they are employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels, not from carrying passengers, but from being moved through the waters of New York by steam, for any purpose whatever.

The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be,

raised in this case. The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself, is that the laws of congress for the regulation of commerce, do not look to the principle of which vessels are moved. That subject is left entirely to individual discretion; and in that vast and complex system of legislative enactment concerning it, which embraces everything which the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act,[3] granting a particular privilege to steamboats. With this exception, every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And, if the occupation of steam-boats be a matter of such general notoriety that the court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history, that, in our western waters, their principal employment is the transportation of merchandise; and all know, that in the waters of the Atlantic they are frequently so employed.

But all inquiry into this subject seems to the court to be put completely at rest, by the act already mentioned, entitled, "An act for the enrolling and licensing of steamboats."

This act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

This act demonstrates the opinion of congress, that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports

[3] 2 Stats. at Large, 694.

which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a State inhibiting the use of either to any vessel having a license under the act of congress, comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter in an examination of that part of the constitution which empowers congress to promote the progress of science and the useful arts.

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[Mr. Justice Johnson delivered a concurring opinion.]

Note.—In the courts of New York, the State law had been upheld as constitutional by Chancellor Kent and his associates. The reasons for Kent's opinion are given in his Commentaries, i., 433, 438.

BROWN ET AL. v. THE STATE OF MARYLAND.

12 Wheaton, 419. Decided 1827.

Error to the court of appeals of Maryland.

The case is stated in the opinion of the court. . . .

Marshall, C. J., delivered the opinion of the court.

This is a writ of error to a judgment rendered in the court of appeals of Maryland, affirming a judgment of the city court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an act of the legislature of Maryland. The indictment was founded on the 2d section of that act, which is in these words: "And be it enacted that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, &c., and other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one

package of foreign dry goods without having license to do so. A judgment was rendered against them, on demurrer, for the penalty which the act prescribes for the offense; and that judgment is now before this court.

This cause depends entirely on the question whether the legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported.

It has been truly said, that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality. The plaintiffs in error take the burden upon themselves, and insist that the act under consideration is repugnant to two provisions in the constitution of the United States.

1. To that which declares that "no State shall, without the consent of congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon States "to lay any imposts or duties on imports or exports." The counsel for the State of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope.

In performing the delicate and important duty of construing clauses in the constitution of our country, which involve conflicting powers of the government of the Union, and of the respective States, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.

What, then, is the meaning of the words, "imposts, or duties on imports or exports?"

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy

and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports"? The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition, show the extent in which it was understood. The limitation is, "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the States to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws, goes far in proving that the framers of the constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the subject, and passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner

in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment upon it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of congress. Whether the prohibition to "lay imposts, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious, that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a State, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular State. We are told that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an argument against its existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety. The States will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. We do not suppose any State would act so unwisely. But we do not place the question on that ground.

These arguments apply with precisely the same force against the whole prohibition. It might, with the same reason, be said that no State would be so blind to its own interests as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our constitution have thought this a power which no State ought to exercise. Conceding, to the full extent which is required, that every State would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded that each would respect the interests of others. A duty on imports is a tax on the article which is paid by the consumer. The great importing States would thus levy a tax on the non-importing States, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those States whose situation was less favorable to importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the States. When we are inquiring whether a particuar act is within this prohibition, the question is not, whether a State may so legislate as to hurt itself, but whether the act is within the words and mischief of the prohibitory clause. It has already been shown, that a tax on the article in the hands of the importer, is within its words; and we think it too clear for controversy, that the same tax is within its mischief. We think it unquestionable, that such a tax has precisely the same tendency to enhance the price of the article, as if imposed upon it while entering the port.

The counsel for the State of Maryland, insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the States, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist that entering the country is the point of time when the prohibition ceases, and the power of the State to tax commences.

It may be conceded, that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of

the Union, and the nature of the often conflicting powers which remain in the States, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the article enters the country. It is, we think, obvious that this construction would defeat the prohibition.

The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understod to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and

re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties.

The counsel for the defendant in error have endeavored to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the State cannot regulate it. He may sell by retail, at auction, or as an itinerant peddler. He may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is denied. An importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

These objections to the principle, if well founded, would certainly be entitled to serious consideration. But we think they will be found, on examination, not to belong necessarily to the principle, and, consequently, not to prove that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition.

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the State, by breaking up his packages, and traveling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he has purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So, if he sells by auction. Auctioneers are persons licensed by

the State, and if the importer chooses to employ them, he can as little object to paying for this service, as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledge to reside in the States, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the constitution no further than to prevent the States from doing that which it was the great object of the constitution to prevent.

But if it should be proved, that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a

tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution.

In support of the argument that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words export and import. As, to export, it is said, means only to carry goods out of the country; so, to import, means only to bring them into it. But, suppose we extend this comparison to the two prohibitions. The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or, suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think, then, that the act under which the plaintiffs in error were indicted, is repugnant to that article of the constitution which declares that "no State shall lay any impost or duties on imports or exports."

2. Is it also repugnant to that clause in the constitution which empowers "congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes"?

The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions

were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several States?

This question was considered in the case of Gibbons v. Ogden, 9 Wheat. Rep., 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingre-

dient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

If this be admitted, and we think it cannot be denied, what can be the meaning of an act of congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed, if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell?

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument, to say, that this state of things will never be produced; that the good sense of the States is a sufficient security against it. The constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? not, how far will it be probably abused? The power claimed by the State is, in its nature, in conflict with that given to congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

We think, then, that if the power to authorize a sale exists in congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article, in his character of importer, must be in opposition to the act of congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power of congress to regulate commerce, since an essential part of that regulation, and principal object of it, is, to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.

It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a State to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the States must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one part to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a State from taxing any article passing through it, from one State to another, for the purpose of traffic? or from taxing the transportation of articles passing from the State itself to another State for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further, or to give additional illustrations of it, because the subject was taken up and considered with great attention, in McCulloch v. The State of Maryland, 4 W., 316, the decision in which case is, we think, entirely applicable to this.

It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

We think there is error in the judgment of the court of appeals of the State of Maryland, in affirming the judgment of the Baltimore city court, because the act of the legislature of Maryland, imposing the penalty for which the said judgment is rendered, is repugnant to the constitution of the United States, and, consequently, void. The judgment is to be reversed, and the cause remanded to that court, with instructions to enter judgment in favor of the appellants.

[Mr. Justice Thompson gave a dissenting opinion.]

LICENSE CASES.

THURLOW v. THE COMMONWEALTH OF MASSACHUSETTS.

FLETCHER v. THE STATE OF RHODE ISLAND.

PEIRCE ET AL. v. THE STATE OF NEW HAMPSHIRE.

5 Howard, 504. Decided 1846.

These three cases came up on writs of error under the 25th section of the judiciary act of 1789,[1] and were argued together. . . .

It is not deemed necessary to set out the statutes on which the indictments were found. Their substance and effect are clearly stated by the chief justice, as well as by the other judges, in their opinions, and there was no controversy concerning their construction, or meaning and effect.

No opinion of the court was pronounced. Each justice gave his own reasons for affirming the decision of the state courts.

Taney, C. J. In the cases of Thurlow v. The State of Massachusetts, of Fletcher v. The State of Rhode Island, and of Peirce et al. v. The State of New Hampshire, the judgments of the respective state courts are severally affirmed.

[1] 1 Stats. at Large, 85.

The justices of this court do not, however, altogether agree in the principles upon which these cases are decided, and I therefore proceed to state the grounds upon which I concur in affirming the judgments. The first two of these cases depend upon precisely the same principles; and, although the case against the State of New Hampshire differs in some respects from the others, yet there are important principles common to all of them, and on that account it is more convenient to consider them together. Each of the cases has arisen upon state laws, passed for the purpose of discouraging the use of ardent spirits within their respective territories, by prohibiting their sale in small quantities, and without licenses previously obtained from the state authorities. And the validity of each of them has been drawn in question, upon the ground that it is repugnant to that clause of the constitution of the United States which confers upon congress the power to regulate commerce with foreign nations, and among the several States. . . .

The constitution of the United States declares that that constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. It follows that a law of congress, regulating commerce with foreign nations, or among the several States, is the supreme law; and if the law of a State is in conflict with it, the law of congress must prevail, and the state law cease to operate so far as it is repugnant to the law of the United States.

It is equally clear that the power of congress over this subject does not extend further than the regulation of commerce with foreign nations and among the several States; and that beyond these limits, the States have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every State, therefore, may regulate its own internal traffic, according to its own judgment, and upon its own views of the interest and well-being of its citizens.

I am not aware that these principles have ever been questioned. The difficulty has always arisen on their application; and that difficulty is now presented in the Rhode Island and Massachusetts cases, where the question is, how far a State may regulate or prohibit the sale of ardent spirits, the importation of which from foreign countries has been authorized by congress. Is such a law a regulation of foreign commerce, or of the internal traffic of the State?

It is unquestionably no easy task to mark, by a certain and definite line, the division between foreign and domestic commerce, and to fix the precise point, in relation to every imported article, where the paramount power of congress terminates, and that of the State begins. The constitution itself does not attempt to define these limits. They cannot be determined by the laws of congress or the States, as neither can, by its own legislation, enlarge its own powers, or restrict those of the other. And as the constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the constitution.

This question came directly before the court, for the first time, in the case of Brown v. The State of Maryland, 12 Wheat., 419. And the court there held that an article authorized by a law of congress to be imported, continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale, in the original bale, package, or vessel in which it was imported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported; and that no State, either by direct assessment, or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of congress had itself imposed; but that, when the original package was broken up, for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the State, and might be taxed for state purposes, and the sale regulated by the State, like any other property. This I understand to be substantially the decision in the case of Brown v. The State of Maryland, drawing the line between foreign commerce, which is subject to the regulation of congress, and internal or domestic commerce, which belongs to the States, and over which congress can exercise no control.

I argued the case in behalf of the State, and endeavored to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down

by the supreme court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things, the line of division is in some degree vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of this provision in the constitution. Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the state government. The immense amount of foreign products used and consumed in this country are imported, landed, and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the State in which they are imported. A great (perhaps the greater) part imported, in some of the cities, is not owned or brought in by citizens of the State, but by citizens of other States, or foreigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely in transitu, and on their way to the distant cities, villages, and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for state purposes, whether by direct assessment or, indirectly, by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon the merchandise when passing through a State. A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a State is permitted to levy it in any form, it will put it in the power of a maritime importing State to raise a revenue for the support of its own government from citizens of other States, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports. Such a power in a State would defeat one of the principal objects of forming and adopting the constitution. It cannot be done directly, in the shape of a duty on imports, for that is expressly prohibited. And as it cannot be done directly, it could hardly be a just and sound construction of the constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form.

Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consist of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State. Nor, indeed, can it even influence materially the price of the commodity to the consumer, since foreigners, as well as citizens of other States, who are not chargeable with the tax, may import goods into the same place and offer them for sale in the same market, and with whom the resident merchant necessarily enters into competition.

Adopting, therefore, the rule as laid down in Brown v. The State of Maryland, 12 W., 419, I proceed to apply it to the cases of Massachusetts and Rhode Island. The laws of congress regulating foreign commerce authorize the importation of spirits, distilled liquors, and brandy, in casks or vessels not containing less than a certain quantity, specified in the laws upon this subject. Now, if the state laws in question came in collision with those acts of Congress, and prevented or obstructed the importation or sale of these articles by the importer in the original cask or vessel in which they were imported, it would be the duty of this court to declare them void.

It has, indeed, been suggested, that, if a State deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice, and pauperism into the State, it may constitutionally refuse to permit its importation, notwithstanding the laws of congress; and that a State may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence, or pauperism from abroad. But it must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists. And congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted, and what

excluded; and may therefore admit, or not, as it shall seem best, the importation of ardent spirits. And inasmuch as the laws of congress authorize their importation, no State has a right to prohibit their introduction.

But I do not understand the law of Massachusetts or Rhode Island as interfering with the trade in ardent spirits while the article remains a part of foreign commerce, and is in the hands of the importer for sale, in the cask or vessel in which the laws of congress authorize it to be imported. These state laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the State. These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper. Of the wisdom of this policy, it is not my province or my purpose to speak. Upon that subject, each State must decide for itself. I speak only of the restrictions which the constitution and laws of the United States have imposed upon the States. And as the laws of Massachusetts and Rhode Island are not repugnant to the constitution of the United States, and do not come in conflict with any law of congress passed in pursuance of its authority to regulate commerce with foreign nations and among the several States, there is no ground upon which this court can declare them to be void.

I now come to the New Hampshire case, in which a different principle is involved,—the question, however, arising under the same clause in the constitution, and depending on its construction.

The law of New Hampshire prohibits the sale of distilled spirits, in any quantity, without a license from the selectmen of the town in which the party resides. The plaintiffs in error, who were merchants in Dover, in New Hampshire, purchased a barrel of

gin in Boston, brought it to Dover, and sold it in the cask in which it was imported, without a license from the selectmen of the town. For this sale they were indicted, convicted, and fined, under the law above mentioned.

The power to regulate commerce among the several States is granted to congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it. And, according to the doctrine in Brown v. Maryland, the article in question, at the time of the sale, was subject to the legislation of congress.

The present case, however, differs from Brown v. The State of Maryland in this,—that the former was one arising out of commerce with foreign nations, which congress had regulated by law; whereas the present is a case of commerce between two States, in relation to which congress has not exercised its power. Some acts of congress have indeed been referred to in relation to the coasting trade. But they are evidently intended merely to prevent smuggling, and do not regulate imports or exports from one State to another. This case differs also from the cases of Massachusetts and Rhode Island; because, in these two cases, the laws of the States operated upon the articles after they had passed beyond the limits of foreign commerce, and consequently were beyond the control and power of congress. But the law of New Hampshire acts directly upon an import from one State to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation.

The question therefore brought up for decision is, whether a State is prohibited by the constitution of the United States from making any regulations of foreign commerce, or of commerce with another State, although such regulation is confined to its own territory and made for its own convenience or interest, and does not come in conflict with any law of congress. In other words, whether the grant of power to congress is of itself a prohibition to the States, and renders all state laws upon the subject null and void. This is the question upon which the case turns; and I do not see how it can be decided upon any other ground, provided we adopt the line of division between foreign and domestic commerce as marked out by the court in Brown v. The State of Maryland. I proceed, therefore, to state my opinion upon it.

It is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this court.

But with every respect for the opinion of my brethren with whom I do not agree, it appears to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon congress. Yet, in my judgment, the State may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of congress. Such evidently, I think, was the construction which the constitution universally received at the time of its adoption, as appears from the legislation of congress and of the several States; and a careful examination of the decisions of this court will show, that, so far from sanctioning the opposite doctrine, they recognize and maintain the power of the States.

The language in which the grant of power to the general government is made, certainly furnishes no warrant for a different construction, and there is no prohibition to the States. Neither can it be inferred by comparing the provisions upon this subject with those that relate to other powers granted by the constitution to the general government. On the contrary, in many instances, after the grant is made, the constitution proceeds to prohibit the exercise of the same power by the States in express terms; in some cases absolutely, in others without the consent of congress. And if it was intended to forbid the States from making any regulations of commerce, it is difficult to account for the omission to prohibit it, when that prohibition has been so carefully and distinctly inserted in relation to other powers, where the action of the State over the same subject was intended to be entirely excluded. But if, as I think, the framers of the constitution (knowing that a multitude of minor regulations must be necessary, which congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the federal government supreme upon this subject over that of the States, then the omission of any prohibition is accounted for, and is consistent with the whole instrument. The supremacy of the laws of congress, in cases of collision with state laws, is secured in the article which declares that the laws of congress, passed in pursuance of the powers granted, shall be the supreme law; and it is only where both governments may legislate on the same sub-

ject that this article may operate. For if the mere grant of power to the general government was in itself a prohibition to the States, there would seem to be no necessity for providing for the supremacy of the laws of congress, as all state laws upon the subject would be ipso facto void, and there could, therefore, be no such thing as conflicting laws, nor any question about the supremacy of conflicting legislation. It is only where both may legislate on the subject that the question can arise.

I have said that the legislation of congress and the States has conformed to this construction from the foundation of the government. This is sufficiently exemplified in the laws in relation to pilots and pilotage, and the health and quarantine laws.

In relation to the first, they are admitted on all hands to belong to foreign commerce, and to be subject to the regulations of congress, under the grant of power of which we are speaking. Yet they have been continually regulated by the maritime States, as fully and entirely since the adoption of the constitution as they were before; and there is but one law of congress[1] making any specific regulation upon the subject, and that passed as late as 1837, and intended, as it is understood, to alter only a single provision of the New York law, leaving the residue of its provisions entirely untouched. It is true, that the act of 1789[2] provides that pilots shall continue to be regulated by the laws of the respective States then in force, or which may thereafter be passed, until congress shall make provision on the subject. And undoubtedly congress had the power, by assenting to the state laws then in force, to make them its own, and thus make the previous regulations of the States the regulations of the general government. But it is equally clear, that, as to all future laws by the States, if the constitution deprived them of the power of making any regulations on the subject, an act of congress could not restore it. For it will hardly be contended that an act of congress can alter the constitution, and confer upon a State a power which the constitution declares it shall not possess. And if the grant of power to the United States to make regulations of commerce is a prohibition to the States to make any regulation upon the subject, congress could no more restore to the States the power of which it was thus deprived, than it could authorize them to coin money, or make paper money a tender in the payment of debts, or to do any other act forbidden to them by the constitution. Every pilot law in the commercial States

[1] 5 Stats. at Large, 153. [2] 1 Ibid., 54.

has, it is believed, been either modified or passed since the act of 1789 adopted those then in force; and the provisions since made are all void, if the restriction on the power of the States now contended for should be maintained; and the regulations made, the duties imposed, the securities required, and penalties inflicted by these various state laws are mere nullities, and could not be enforced in a court of justice. It is hardly necessary to speak of the mischiefs which such a construction would produce to those who are engaged in shipping, navigation, and commerce. Up to this time their validity has never been questioned. On the contrary, they have been repeatedly recognized and upheld by the decisions of this court; and it will be difficult to show how this can be done, except upon the construction of the constitution which I am now maintaining. So, also, in regard to health and quarantine laws. They have been continually passed by the States ever since the adoption of the constitution, and the power to pass them recognized by acts of congress, and the revenue officers of the general government directed to assist in their execution. Yet all of these health and quarantine laws are necessarily, in some degree, regulations of foreign commerce in the ports and harbors of the State. They subject the ship, and cargo, and crew to the inspection of a health officer appointed by the State; they prevent the crew and cargo from landing until the inspection is made, and destroy the cargo if deemed dangerous to health. And during all this time the vessel is detained at the place selected for the quarantine ground by the state authority. The expenses of these precautionary measures are also usually, and I believe universally, charged upon the master, the owner, or the ship, and the amount regulated by the state law, and not by congress. Now, so far as these laws interfere with shipping, navigation, or foreign commerce, or impose burdens upon either of them, they are unquestionably regulations of commerce. Yet, as I have already said, the power has been continually exercised by the States, has been continually recognized by congress ever since the adoption of the constitution, and constantly affirmed and supported by this court whenever the subject came before it.

The decisions of this court will, also, in my opinion, when carefully examined, be found to sanction the construction I am maintaining. It is not my purpose to refer to all of the cases in which this question has been spoken of, but only to the principal and leading ones; and,—

First, to Gibbons v. Ogden, 9 Wheat., 1, because this is the case usually referred to and relied on to prove the exclusive power

of congress and the prohibition to the States. It is true that one or two passages in that opinion, taken by themselves, and detached from the context, would seem to countenance this doctrine. And, indeed, it has always appeared to me that this controversy has mainly arisen out of that case, and that this doctrine of the exclusive power of congress, in the sense in which it is now contended for, is comparatively a modern one, and was never seriously put forward in any case until after the decision of Gibbons v. Ogden, although it has been abundantly discussed since. Still, it seems to me to be clear, upon a careful examination of that case, that the expressions referred to do not warrant the inference drawn from them, and were not used in the sense imputed to them; and that the opinion in that case, when taken altogether and with reference to the subject-matter before the court, establishes the doctrine that a State may, in the execution of its powers of internal police, make regulations of foreign commerce; and that such regulations are valid, unless they come into collision with a law of congress. Upon examining that opinion, it will be seen that the court, when it uses the expressions which are supposed to countenance the doctrine of exclusive power in congress, is commenting upon the argument of counsel in favor of equal powers on this subject in the States and the general government, where neither party is bound to yield to the other; and is drawing the distinction between cases of concurrent powers and those in which the supreme or paramount power was granted to congress. It therefore very justly speaks of the States as exercising their own powers in laying taxes for state purposes, although the same thing is taxed by congress; and as exercising the powers granted to congress when they make regulations of commerce. In the first case, the state power is concurrent with that of the general government,—is equal to it, and is not bound to yield. In the second, it is subordinate and subject to the superior and controlling power conferred upon congress.

Moreover the court distinctly admits, on pages 205, 206, that a State may, in the execution of its police and health laws, make regulations of commerce, but which congress may control. It is very clear, that, so far as these regulations are merely internal, and do not operate on foreign commerce, or commerce among the States, they are altogether independent of the power of the general government and cannot be controlled by it. The power of control, therefore, which the court speaks of, presupposes that they are regulations of foreign commerce, or commerce among the States. And if a State, with a view to its police or health, may

make valid regulations of commerce which yet fall within the controlling power of the general government, it follows that the State is not absolutely prohibited from making regulations of foreign commerce within its own territorial limits, provided they do not come in conflict with the laws of congress.

It has been said, indeed, that quarantine and health laws are passed by the States, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are yet admitted to be equally valid. But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States. And when the validity of a state law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interest and convenience of trade.

Upon this question, the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power. Are the States absolutely prohibited by the constitution from making any regulations of foreign commerce? If they are, then such regulations are null and void, whatever may have been the motive of the State, or whatever the real object of the law; and it requires no law of congress to control or annul them. Yet the case of Gibbons v. Ogden, 9 Wheat., 1, unquestionably affirms that such regulations may be made by a State, subject to the controlling power of congress. And if this may be done, it necessarily follows that the grant of power to the federal government is not an absolute and entire prohibition to the States, but merely confers upon congress the superior and controlling power. And to expound the particular passages hereinbefore

mentioned in the manner insisted upon by those who contend for the prohibition, would be to make different parts of that opinion inconsistent with each other,—an error which I am quite sure no one will ever impute to the very eminent jurist by whom the opinion was delivered.

And that the meaning of the court in the case of Gibbons v. Ogden was such as I have insisted on, is, I think, conclusively proved by the case of Willson et al. v. The Blackbird Creek Marsh Company, 2 Pet., 251, 252. In that case, a dam authorized by a state law had been erected across a navigable creek, so as to obstruct the commerce above it. And the validity of the state law was objected to, on the ground that it was repugnant to the constitution of the United States, being a regulation of commerce. But the court says: "The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several States; a power which has not been so exercised as to affect the question," and then proceeds to decide that the law of Delaware could not "be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

The passages I have quoted show that the validity of the state law was maintained because it was not in conflict with a law of congress, although it was confessedly within the limits of the power granted. And it is worthy of remark, that the counsel for the plaintiff in error in that case relied upon Gibbons v. Ogden, as conclusive authority to show the unconstitutionality of the state law, no doubt placing upon the passages I have mentioned the construction given to them by those who insist upon the exclusiveness of the power. This case, therefore, was brought fully to the attention of the court. And the decision in the last case, and the grounds on which it was placed, in my judgment, show most clearly what was intended in Gibbons v. Ogden; and that in that case, as well as in the case of Willson et al. v. The Blackbird Creek Marsh Company, the court held that a state law was not invalid merely because it made regulations of commerce, but that its invalidity depended upon its repugnancy to a law of congress passed in pursuance of the power granted. And it is worthy, also, of remark, that the opinion in both of these cases was delivered by Chief Justice Marshall, and I consider his opinion in the latter one as an exposition of what he meant to decide in the former.

In the case of the City of New York v. Miln, 11 Pet., 130, the

question as to the power of the States upon this subject was very fully discussed at the bar. But no opinion was expressed upon it by the court, because the case did not necessarily involve it, and there was great diversity of opinion on the bench. Consequently the point was left open, and has never been decided in any subsequent case in this court.

For my own part, I have always regarded the cases of Gibbons v. Ogden, 9 Wheat., 1, and Willson et al. v. The Blackbird Creek Marsh Company, 2 Pet., 245, as abundantly sufficient to sanction the construction of the constitution which in my judgment is the true one. Their correctness has never been questioned; and I forbear, therefore, to remark on the other cases in which this subject has been mentioned and discussed.

It may be well, however, to remark, that in analogous cases, where, by the constitution of the United States, power over a particular subject is conferred on congress without any prohibition to the States, the same rule of construction has prevailed. Thus in the case of Houston v. Moore, 5 Wheat., 1, it was held that the grant of power to the federal government to provide for organizing, arming, and disciplining the militia, did not preclude the States from legislating on the same subject, provided the law of the State was not repugnant to the law of congress. And every State in the Union has continually legislated on the subject, and I am not aware that the validity of these laws has ever been disputed, unless they came in conflict with the law of congress.

The same doctrine was held in the case of Sturges v. Crowninshield, 4 Wheat., 196, under the clause in the constitution which gives to congress the power to establish uniform laws on the subject of bankruptcies throughout the United States.

And in the case of Chirac v. Chirac, 2 Wheat., 269, which arose under the grant of power to establish a uniform rule of naturalization, where the court speak of the power of congress as exclusive, they are evidently merely sanctioning the argument of counsel stated in the preceding sentence, which placed the invalidity of the naturalization under the law of Maryland, not solely upon the grant of power in the constitution, but insisted that the Maryland law was "virtually repealed by the constitution of the United States, and the act of naturalization enacted by congress." Undoubtedly it was so repealed, and the opposing counsel in the case did not dispute it. For the law of the United States covered every part of the Union, and there could not, therefore, by possibility, be a state law which did not come in conflict with it. And, indeed, in this case, it might well have been doubted whether the

grant in the constitution itself did not abrogate the power of the States, inasmuch as the constitution also provided that the citizens of each State should be entitled to all the privileges and immunities of citizens in the several States; and it would seem to be hardly consistent with this provision to allow any one State, after the adoption of the constitution, to exercise a power which, if it operated at all, must operate beyond the territory of the State, and compel other States to acknowledge as citizens those whom it might not be willing to receive.

In referring to the opinions of those who sat here before us, it is but justice to them, in expounding their language, to keep in mind the character of the case they were deciding. And this is more especially necessary in cases depending upon the construction of the constitution of the United States, where, from the great public interests which must always be involved in such questions, this court have usually deemed it advisable to state very much at large the principles and reasoning upon which their judgment was founded, and to refer to and comment on the leading points made by the counsel on either side in the argument. And I am not aware of any instance in which the court have spoken of the grant of power to the general government as excluding all State power over the subject, unless they were deciding a case where the power had been exercised by congress, and a state law came in conflict with it. In cases of this kind, the power of Congress undoubtedly excludes and displaces that of the State; because, wherever there is collision between them, the law of congress is supreme. And it is in this sense only, in my judgment, that it has been spoken of as exclusive in the opinions of the court to which I have referred. The case last mentioned is a striking example; for there the language of the court, affirming in the broadest terms the exclusiveness of the power, evidently refers to the argument of counsel stated in the preceding sentence.

Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For, although the gin sold was an import from another State, and congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet, as congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue.

The judgment of the state courts ought, therefore, in my opinion, to be affirmed in each of the three cases before us. . . .

[Messrs. Justices McLean, Catron, Daniel, Woodbury, and Grier also gave opinions. Mr. Justice Nelson concurred in the opinions of the Chief Justice and of Mr. Justice Catron].

THE PASSENGER CASES.

SMITH v. TURNER. NORRIS v. BOSTON.

7 Howard, 283. Decided 1848.

There were writs of error, the first to the court for the trial of impeachments, &c., of the State of New York, the second, to the supreme judicial court of the State of Massachusetts, under the 25th section of the judiciary act of 1789, 1 Stats. at Large, 85. The cases will be found succinctly but clearly stated in the opinions of Justice McLean . . . of Justice Catron . . . and of Justice Grier. . . .

Smith v. Turner.

McLean, J. Under the general denomination of health laws in New York, and by the 7th section of an act relating to the marine hospital, it is provided, that "the health commissioners shall demand and be entitled to receive, and in case of neglect or refusal to pay, shall sue for and recover, in his name of office, the following sums from the master of every vessel that shall arrive in the port of New York, namely:—

"1. From the master of every vessel from a foreign port, for himself and each cabin passenger, $1.50; for each steerage passenger, mate, sailor, or mariner, $1.

"2. From the master of each coasting vessel, for each person on board, $0.25; but no coasting vessel from the States of New Jersey, Connecticut, and Rhode Island shall pay for more than one voyage in each month, computing from the first voyage in each year."

The 8th section provides that the money so received, shall be denominated "hospital moneys." And the 9th section gives "each

master paying hospital moneys, a right to demand and recover from each person the sum paid on his account." The 10th section declares any master, who shall fail to make the above payments within twenty-four hours after the arrival of his vessel in the port, shall forfeit the sum of $100. By the 11th section, the commissioners of health are required to account annually to the comptroller of the State for all moneys received by them for the use of the marine hospital; "and if such money shall, in any one year, exceed the sum necessary to defray the expenses of their trust, including their own salaries, and exclusive of such expenses as are to be borne and paid as a part of the contingent charges of the city of New York, they shall pay over such surplus to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of the society."

The plaintiff in error was master of the British ship Henry Bliss, which vessel touched at the port of New York in the month of June, 1841, and landed 290 steerage passengers. The defendant in error brought an action of debt on the statute against the plaintiff, to recover $1 for each of the above passengers. A demurrer was filed, on the ground that the statute of New York was a regulation of commerce, and in conflict with the constitution of the United States. The supreme court of the State overruled the demurrer, and the court of errors affirmed the judgment. This brings before this court, under the 25th section of the judiciary act, the constitutionality of the New York statute.

I will consider the case under two general heads:—

1. Is the power of congress to regulate commerce an exclusive power?

2. Is the statute of New York a regulation of commerce?

[In answer to the first question citations are given from Holmes v. Jennison, 14 Pet., 570; Houston v. Moore, 5 Wheat., 23; Gibbons v. Ogden, 9 Wheat., 196; Brown v. Maryland, 12 Wheat., 446; New York v. Miln, 11 Pet., 158; Sturges v. Crowninshield, 4 Wheat., 122; Wilson v. The Blackbird Creek Marsh Co., 2 Pet., 250, and The Federalist, No. 32.]

Whether I consider the nature and object of the commercial power, the class of powers with which it is placed, the decision of this court in the case of Gibbons v. Ogden, 9 Wheat., 1, reiterated in Brown v. The State of Maryland, 12 Wheat., 419, and often reasserted by Mr. Justice Story, who participated in those decisions, I am brought to the conclusion that the power "to regulate commerce with foreign nations, and among the several States," by the constitution, is exclusively vested in congress.

I come now to inquire, under the second general proposition, Is the statute of New York a regulation of foreign commerce?

All commercial action within the limits of a State, and which does not extend to any other State or foreign country, is exclusively under state regulation. Congress have no more power to control this than a State has to regulate commerce "with foreign nations and among the several States." And yet Congress may tax the property within a State, of every description, owned by its citizens, on the basis provided in the constitution, the same as a State may tax it. But if congress should impose a tonnage duty on vessels which ply between ports within the same State, or require such vessels to take out a license, or impose a tax on persons transported in them, the act would be unconstitutional and void. But foreign commerce and commerce among the several States, the regulation of which, with certain constitutional exceptions, is exclusively vested in congress, no State can regulate.

In giving the commercial power to congress, the States did not part with that power of self-preservation which must be inherent in every organized community. They may guard against the introduction of anything which may corrupt the morals, or endanger the health or lives of their citizens. Quarantine or health laws have been passed by the States, and regulations of police for their protection and welfare. The inspection laws of a State apply chiefly to exports, and the State may lay duties and imposts on imports or exports, to pay the expense of executing those laws. But a State is limited to what shall be "absolutely necessary" for that purpose. And still further to guard against the abuse of this power, it is declared that "the net produce of all duties and imposts laid by a State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of congress."

The cautious manner in which the exercise of this commercial power by a State is guarded, shows an extreme jealousy of it by the convention; and no doubt the hostile regulations of commerce by the States, under the confederation, had induced this jealousy. No one can read this provision, and the one which follows it in relation to tonnage duties, without being convinced that they cover, and were intended to cover, the entire subject of foreign commerce. A criticism on the term "import," by which to limit the obvious meaning of this paragraph, is scarcely admissible in construing so grave an instrument.

Commerce is defined to be "an exchange of commodities." But this definition does not convey the full meaning of the term. It

includes "navigation and intercourse." That the transportation of passengers is a part of commerce, is not now an open question. In Gibbons v. Ogden, this court say: "No clear distinction is perceived between the powers to regulate vessels in transporting men for hire, and property for hire." The provision of the constitution, that "the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by congress prior to the year 1808," is a restriction on the general power of congress to regulate commerce. In reference to this clause, this court say, in the above case: "This section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men who pass from place to place voluntarily, and to those who pass involuntarily."

To encourage foreign emigration was a cherished policy of this country at the time the constitution was adopted. As a branch of commerce, the transportation of passengers has always given a profitable employment to our ships, and, within a few years past, has required an amount of tonnage nearly equal to that of imported merchandise.

Is this great branch of our commerce left open to state regulation on the ground that the prohibition refers to an import, and a man is not an import?

Pilot laws, enacted by the different States, have been referred to as commercial regulations. That these laws do regulate commerce, to a certain extent, is admitted; but from what authority do they derive their force? Certainly, not from the States. By the fourth section of the act of the 7th of August, 1789,[1] it is provided: "That all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress." These State laws, by adoption, are the laws of congress, and as such, effect is given to them. So the laws of the States which regulate the practice of their courts, are adopted by congress to regulate the practice of the federal courts. But these laws, so far as they are adopted, are as much the laws of the United States, and it has often been so held, as if they had been specifically enacted by congress. A repeal of them by the State, unless future changes in the acts be

[1] 1 Stats. at Large, 54.

also adopted, does not affect their force in regard to federal action.

In the above instances, it has been deemed proper for congress to legislate, by adopting the law of the States. And it is not doubted that this has been found convenient to the public service. Pilot laws were in force in every commercial State on the seaboard when the constitution was adopted; and on the introduction of a new system, it was prudent to preserve, as far as practicable, the modes of proceeding with which the people of the different States were familiar. In regard to pilots, it was not essential that the laws should be uniform,—their duties could be best regulated by an authority acquainted with the local circumstances under which they were performed; and the fact that the same system is continued, shows that the public interest has required no change.

No one has yet drawn the line clearly, because, perhaps, no one can draw it, between the commercial power of the Union, and the municipal power of a State. Numerous cases have arisen, involving these powers, which have been decided, but a rule has necessarily been observed as applicable to the circumstances of each case. And so must every case be adjudged. A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens. A State may tax the stages in which the mail is transported; but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce. And yet, in both instances, the tax on the property in some degree affects its use.

An inquiry is made whether congress, under "the power to regulate commerce among the several States," can impose a tax for the use of canals, railroads, turnpike roads, and bridges, constructed by a State, or its citizens? I answer, that congress has no such power. The United States cannot use any one of these works without paying the customary tolls. The tolls are imposed, not as a tax, in the ordinary sense of that term, but as compensation for the increased facility afforded by the improvement.

The act of New York now under consideration is called a health law. It imposes a tax on the master and every cabin passenger of a vessel from a foreign port of $1.50; and of $1 on the mate, each steerage passenger, sailor, or mariner. And the master is made responsible for the tax, he having a right to exact it of the others. The funds so collected are denominated hospital moneys, and are applied to the use of the marine hospital; the surplus to be paid to the treasurer of the Society for the Reformation of Juvenile

Delinquents in the city of New York, for the use of that society.

To call this a health law would seem to be a misapplication of the term. It is difficult to perceive how a health law can be extended to the reformation of juvenile offenders. On the same principle, it may be made to embrace all offenders, so as to pay the expenses incident to an administration of the criminal law. And with the same propriety, it may include the expenditures of any branch of the civil administration of the city of New York, or of the State. In fact, I can see no principle on which the fund can be limited, if it may be used as authorized by the act. The amount of the tax is as much within the discretion of the legislature of New York as the objects to which it may be applied.

It is insisted, that if the act, as regards the hospital fund, be within the power of the State, the application of a part of the fund to other objects, as provided in the act, cannot make it unconstitutional. This argument is unsustainable. If the State has power to impose a tax to defray the necessary expenses of a health regulation, and this power being exerted, can the tax be increased so as to defray the expenses of the state government? This is within the principle asserted.

The case of The City of New York v. Miln, 11 Pet., 102, is relied on with great confidence, as sustaining the act in question. As I assented to the points ruled in that case, consistency, unless convinced of having erred, will compel me to support the law now before us, if it be the same in principle. The law in Miln's case required that "the master or commander of any ship or other vessel arriving at the port of New York shall, within twenty-four hours after his arrival, make a report, in writing, on oath or affirmation, to the mayor of the city of New York, of the name, place of birth, and last legal settlement, age, and occupation of every person brought as a passenger; and of all persons permitted to land at any place during the voyage, or go on board of some other vessel, with the intention of proceeding to said city; under the penalty on such master or commander, and the owner or owners, consignee or consignees, of such ship or vessel, severally and respectively, of $75 for each individual not so reported." And the suit was brought against Miln, as consignee of the ship Emily, for the failure of the master to make report of the passengers on board of his vessel.

In their opinion, this court say: "The law operated on the territory of New York, over which that State possesses an acknowledged and undisputed jurisdiction for every purpose of internal regulation;" and "on persons whose rights and duties are rightfully

prescribed and controlled by the laws of the respective States, within whose territorial limits they are found." This law was considered as an internal police regulation, and as not interfering with commerce.

A duty was not laid upon the vessel or the passengers, but the report only was required from the master, as above stated. Now, every State has an unquestionable right to require a register of the names of the persons who come within it to reside temporarily or permanently. This was a precautionary measure to ascertain the rights of the individuals, and the obligations of the public, under any contingency which might occur. It opposed no obstruction to congress, imposed no tax or delay, but acted upon the master, owner, or consignee of the vessel, after the termination of the voyage, and when he was within the territory of the State, mingling with its citizens, and subject to its laws.

But the health law, as it is called, under consideration, is altogether different in its objects and means. It imposes a tax or duty on the passengers, officers, and sailors, holding the master responsible for the amount at the immediate termination of the voyage, and, necessarily, before the passengers have set their feet on land. The tax on each passenger, in the discretion of the legislature, might have been $5 or $10, or any other sum, amounting even to a prohibition of the transportation of passengers; and the professed object of the tax is as well for the benefit of juvenile offenders as for the marine hospital. And it is not denied that a considerable sum thus received has been applied to the former object. The amount and application of this tax are only important to show the consequences of the exercise of this power by the States. The principle involved is vital to the commercial power of the Union.

The transportation of passengers is regulated by congress. More than two passengers for every five tons of the ship or vessel are prohibited, under certain penalties; and the master is required to report to the collector a list of the passengers from a foreign port, stating the age, sex, and occupation of each, and the place of their destination. In England, the same subject is regulated by act of parliament, and the same thing is done, it is believed, in all commercial countries. If the transportation of passengers be a branch of commerce, of which there can be no doubt, it follows that the act of New York, in imposing this tax, is a regulation of commerce. It is a tax upon a commercial operation,—upon what may, in effect, be called an import. In a commercial sense, no just distinction can be made, as regards the law in question, between

the transportation of merchandise and passengers. For the transportation of both, the ship-owner realizes a profit, and each is the subject of a commercial regulation by congress. When the merchandise is taken from the ship, and becomes mingled with the property of the people of the State, like other property, it is subject to the local law; but until this shall take place, the merchandise is an import, and is not subject to the taxing power of the State, and the same rule applies to passengers. When they leave the ship and mingle with the citizens of the State, they become subject to its laws.

In Gibbons v. Ogden, the court held that the act of laying "duties or imposts on imports or exports" is derived from the taxing power; and they lay much stress on the fact that this power is given in the same sentence as the power to "lay and collect taxes." "The power," they say, "to regulate commerce is given" in a separate clause, "as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred;" and they remark, that, had not the State been prohibited, they might, under the power to tax, have levied "duties on imports or exports." 9 Wheat., 201.

The constitution requires that all "duties and imposts shall be uniform," and declares that "no preferences shall be given by any regulation of commerce or revenue to the ports of one State over those of another." Now, it is inexplicable to me how thirteen or more independent States could tax imports under these provisions of the constitution. The tax must be uniform throughout the Union; consequently, the exercise of the power by any one State would be unconstitutional as it would destroy the uniformity of the tax. To secure this uniformity was one of the motives which led to the adoption of the constitution. The want of it produced collisions in the commercial regulations of the States. But if, as is contended, these provisions of the constitution operate only on the federal government, and the States are free to regulate commerce by taxing its operations in all cases where they are not expressly prohibited, the constitution has failed to accomplish the great object of those who adopted it.

These provisions impose restrictions on the exercise of the commercial power, which was exclusively vested in congress; and is as binding on the States as any other exclusive power with which it is classed in the constitution.

It is immaterial under what power duties on imports are imposed. That they are the principal means by which commerce is regulated, no one can question. Whether duties shall be im-

posed with the view to protect our manufactures, or for purposes of revenue only, has always been a leading subject of discussion in congress; and also what foreign articles may be admitted free of duty. The force of the argument, that things untouched by the regulating power have been equally considered with those of the same class on which it has operated, is not admitted by the counsel for the defendant. But does not all experience sustain the argument? A large amount of foreign articles brought into this country for several years, have been admitted free of duty. Have not these articles been considered by congress? The discussion in both houses of congress, the report by the committees of both, and the laws that have been enacted, show that they have been duly considered.

Except to guard its citizens against diseases and paupers, the municipal power of a State cannot prohibit the introduction of foreigners brought to this country under the authority of congress. It may deny to them a residence, unless they shall give security to indemnify the public should they become paupers. The slave States have the power, as this court held in Groves v. Slaughter, to prohibit slaves from being brought into them as merchandise. But this was on the ground that such a prohibition did not come within the power of congress "to regulate commerce among the several States." It is suggested that, under this view of the commercial power, slaves may be introduced into the free States. Does any one suppose that congress can ever revive the slave-trade? And if this were possible, slaves, thus introduced, would be free.

As early as May 27, 1796,[1] congress enacted, that "the President be authorized to direct the revenue-officers commanding forts and revenue cutters, to aid in the execution of quarantine, and also in the execution of the health laws of the States respectively." And by the act of Feb. 25, 1799,[2] which repealed the above act, more enlarged provisions were enacted, requiring the revenue-officers of the United States to conform to and aid in the execution of the quarantine and health laws of the States. In the first section of this law there is a proviso that "nothing therein shall enable any State to collect a duty of tonnage or impost without the consent of congress." A proviso limits the provisions of the act into which it is introduced. But this proviso may be considered as not restricted to this purpose. It shows with what caution congress guarded the commercial power, and it is an

[1] 1 Stats. at Large, 474. [2] 1 Ib., 619.

authoritative provision against its exercise by the States. An impost, in its enlarged sense, means any tax or tribute imposed by authority, and applies as well to a tax on persons as to a tax on merchandise. In this sense it was no doubt used in the above act. Any other construction would be an imputation on the intelligence of congress.

If this power to tax passengers from a foreign country belongs to a State, a tax, on the same principle, may be imposed on all persons coming into or passing through it from any other State of the Union. And the New York statute does in fact lay a tax on passengers on board of any coasting-vessel which arrives at the port of New York, with an exception of passengers in vessels from New Jersey, Connecticut, and Rhode Island, who are required to pay for one trip in each month. All other passengers pay the tax every trip.

If this may be done in New York, every other State may do the same, on all the lines of our internal navigation. Passengers on a steamboat which plies on the Ohio, the Mississippi, or on any of our other rives, or on the lakes, may be required to pay a tax, imposed at the discretion of each State within which the boat shall touch. And the same principle will sustain a right in every State to tax all persons who shall pass through its territory on railroad cars, canal boats, stages, or in any other manner. This would enable a State to establish and enforce a non-intercourse with every other State.

The 9th section of the first article of the constitution declares: "Nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another." But if the commercial power of the Union over foreign commerce does not exempt passengers brought into the country from state taxation, they can claim no exemption under the exercise of the same power among the States. In McCulloch v. The State of Maryland, 4 Wheat., 431, this court say: "That there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, is a proposition not to be denied."

The officers and crew of the vessel are as much the instruments of commerce as the ship, and yet they are taxed under this health law of New York as such instruments. The passengers are taxed as passengers, being the subjects of commerce from a foreign country. By the 14th article of the treaty of 1794,[3] with Eng-

[3] 8 Stats. at Large, 116.

land, it is stipulated that the people of each country may freely come, with their ships and cargoes, to the other, subject only to the laws and statutes of the two countries respectively. The statutes here referred to are those of the federal government, and not of the States. The general government only is known in our foreign intercourse.

By the 46th section of the act of March, 1799,[1] the wearing apparel and other personal baggage, and the tools or implements of a mechanical trade, from a foreign port, are admitted free of duty. These provisions of the treaty and of the act are still in force, and they have a strong bearing on this subject. They are, in effect, repugnant to the act of New York.

It is not doubted that a large portion, perhaps nine-tenths, of the foreign passengers landed at the port of New York pass through the State to other places of residence. At such places, therefore, pauperism must be increased much more by the influx of foreigners than in the city of New York. If, by reason of commerce, a burden is thrown upon our commercial cities, congress should make suitable provisions for their relief. And I have no doubt this will be done.

The police power of the State cannot draw within its jurisdiction objects which lie beyond it. It meets the commercial power of the Union in dealing with subjects under the protection of that power, yet it can only be exerted under peculiar emergencies, and to a limited extent. In guarding the safety, the health, and morals of its citizens, a State is restricted to appropriate and constitutional means. If extraordinary expense be incurred, an equitable claim to an indemnity can give no power to a State to tax objects not subject to its jurisdiction.

The attorney-general of New York admitted that if the commercial power were exclusively vested in congress, no part of it can be exercised by a State. The soundness of this conclusion is not only sustainable by the decisions of this court, but by every approved rule of construction. That the power is exclusive seems to be as fully established as any other power under the constitution, which has been controverted.

A tax or duty upon tonnage, merchandise, or passengers is a regulation of commerce, and cannot be laid by a State, except under the sanction of congress and for the purposes specified in the constitution. On the subject of foreign commerce, including the transportation of passengers, congress have adopted such regulations as they deemed proper, taking into view our relations

[1] 1 Stats. at Large, 661.

with other countries. And this covers the whole ground. The act of New York which imposes a tax on passengers of a ship from a foreign port, in the manner provided, is a regulation of foreign commerce, which is exclusively vested in congress; and the act is, therefore, void.

Norris v. City of Boston.

This is a writ of error, which brings before the court the judgment of the supreme court of the State of Massachusetts.

"An act relating to alien passengers," passed the 20th of April, 1837, by the legislature of Massachusetts, contains the following provisions:—

"§ 1. When any vessel shall arrive at any port or harbor within this State, from any port or place without the same, with alien passengers on board, the officer or officers whom the mayor and aldermen of the city, or the selectmen of the town, where it is proposed to land such passengers, are hereby authorized and required to appoint, shall go on board such vessels and examine into the condition of said passengers.

"§ 2. If, on such examination, there shall be found, among said passengers, any lunatic, idiot, maimed, aged, or infirm person, incompetent, in the opinion of the officer so examining, to maintain themselves, or who have been paupers in any other country, no such alien passenger shall be permitted to land, until the master, owner, consignee, or agent of such vessel shall have given to such city or town a bond in the sum of $1,000, with good and sufficient security, that no such lunatic or indigent passenger shall become a city, town, or state charge within ten years from the date of said bond.

"§ 3. No alien passenger, other than those spoken of in the preceding section, shall be permitted to land, until the master, owner, consignee, or agent of such vessel shall pay to the regularly appointed boarding officer the sum of two dollars for each passenger so landing; and the money so collected shall be paid into the treasury of the city or town, to be appropriated, as the city or town may direct, for the support of foreign paupers."

The plaintiff being an inhabitant of St. John's, in the Province of New Brunswick and kingdom of Great Britain, arriving in the port of Boston, from that place, in command of a schooner called The Union Jack, which had on board nineteen alien passengers, for each of which two dollars were demanded of the plaintiff, and paid by him, on protest that the exaction was illegal. An

action being brought, to recover back this money, against the city of Boston, in the court of common pleas, under the instructions of the court, the jury found a verdict for the defendant, on which judgment was entered, and which was affirmed on a writ of error to the supreme court.

Under the 1st and 2d sections of the above act, the persons appointed may go on board of a ship from a foreign port, which arrives at the port of Boston with alien passengers on board, and examine whether any of them are lunatics, idiots, maimed, aged, or infirm, incompetent to maintain themselves, or have been paupers in any other country, and not permit such persons to be put on shore, unless security shall be given that they shall not become a city, town, or state charge. This is the exercise of an unquestionable power in the State to protect itself from foreign paupers and other persons who would be a public charge; but the nineteen alien passengers for whom the tax was paid did not come, nor any one of them, within the second section. The tax of two dollars was paid by the master for each of these passengers before they were permitted to land. This, according to the view taken in the above case of Smith v. Turner, was a regulation of commerce, and not being within the power of the State, the act imposing the tax is void.

The fund thus raised was no doubt faithfully applied for the support of foreign paupers, but the question is one of power, and not of policy. The judgment of the supreme court, in my opinion, should be reversed, and this cause be remanded to that court, with instructions to carry out the judgment of this court.

NORRIS V. CITY OF BOSTON, AND SMITH V. TURNER.

WAYNE, J. I agree with Mr. Justice McLean, Mr. Justice Catron, Mr. Justice McKinley, and Mr. Justice Grier, that the laws of Massachusetts and New York, so far as they are in question in these cases, are unconstitutional and void. I would not say so if I had any, the least, doubt of it; for, I think it obligatory upon this court, when there is a doubt of the unconstitutionality of a law, that its judgment should be in favor of its validity. I have formed my conclusions in these cases with this admission constantly in mind.

Before stating, however, what they are, it will be well for me to say that the four judges and myself, who concur in giving the judgment in these cases, do not differ in the grounds upon which our judgment has been formed, except in one particular, in no way at variance with our united conclusion; and that is, that a

majority of us do not think it necessary in these cases to reaffirm, with our brother McLean, what this court has long since decided, that the constitutional power to regulate "commerce with foreign nations, and among the several States, and with the Indian tribes," is exclusively vested in congress, and that no part of it can be exercised by a State.

I believe it to be so, just as it is expressed in the preceding sentence. And in the sense in which those words were used by this court in the case of Gibbons v. Ogden, 9 Wheat., 198. All that was decided in that case remains unchanged by any subsequent opinion or judgment of this court. Some of the judges of it have, in several cases, expressed opinions that the power to regulate commerce is not exclusively vested in Congress. But they are individual opinions, without judicial authority to overrule the contrary conclusion, as it was given by this court in Gibbons v. Ogden.

Still, I do not think it necessary to reaffirm that position in these cases as a part of our judgments upon them. . . .

In my view, . . . I think the court means now to decide:—

1. That the acts of New York and Massachusetts imposing a tax upon passengers, either foreigners or citizens, coming into the ports in those States, either in foreign vessels or vessels of the United States, from foreign nations or from ports in the United States, are unconstitutional and void, being in their nature regulations of commerce contrary to the grant in the constitution to congress of the power to regulate commerce with foreign nations and among the several States.

2. That the States of this Union cannot constitutionally tax the commerce of the United States for the purposes of paying any expense incident to the execution of their police laws; and that the commerce of the United States includes an intercourse of persons, as well as the importation of merchandise.

3. That the acts of Massachusetts and New York in question in these cases conflict with treaty stipulations existing between the United States and Great Britain, permitting the inhabitants of the two countries "freely and securely to come, with their ships and cargoes, to all places, ports, and rivers in the territories of each country to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of said territories, respectively; also, to hire and occupy houses and warehouses for the purposes of their commerce, and generally the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject al-

ways to the laws and statutes of the two countries respectively;" and that said laws are therefore unconstitutional and void.

4. That the congress of the United States having by sundry acts, passed at different times, admitted foreigners into the United States with their personal luggage and tools of trade, free from all duty or imposts, the acts of Massachusetts and New York, imposing any tax upon foreigners or immigrants for any purpose whatever, whilst the vessel is in transitu to her port of destination, though said vessel may have arrived within the jurisdictional limits of either of the States of Massachusettts and New York, and before the passengers have been landed, are in violation of said acts of congress, and therefore unconstitutional and void.

5. That the acts of Massachusetts and New York, so far as they impose any obligation upon the owners or consignees of vessels, or upon the captains of vessels or freighters of the same, arriving in the ports of the United States within the said States, to pay any tax or duty of any kind whatever, or to be in any way responsible for the same, for passengers arriving in the United States, or coming from a port in the United States, are unconstitutional and void, being contrary to the constitutional grant to congress of the power to regulate commerce with foreign nations and among the several States, and to the legislation of congress under the said power, by which the United States have been laid off into collection districts, and ports of entry established within the same, and commercial regulations prescribed, under which vessels, their cargoes and passengers, are to be admitted into the ports of the United States, as well from abroad as from other ports of the United States. That the act of New York now in question, so far as it imposes a tax upon passengers arriving in vessels from other ports in the United States, is properly in this case before this court for construction, and that the said tax is unconstitutional and void. That the ninth section of the first article of the constitution includes within it the migration of other persons, as well as the importation of slaves, and in terms recognizes that other persons, as well as slaves, may be the subjects of importation and commerce.

6. That the 5th clause of the 9th section of the 1st article of the constitution, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another State; nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another," is a limitation upon the power of congress to regulate commerce for the purpose of producing entire commercial equality

within the United States, and also a prohibition upon the States to destroy such equality by any legislation prescribing a condition upon which vessels bound from one State, shall enter the ports of another State.

7. That the acts of Massachusetts and New York, so far as they impose a tax upon passengers, are unconstitutional and void, because each of them so far conflicts with the first clause of the eighth section of the first article of the constitution, which enjoins that all duties, imposts, and excises shall be uniform throughout the United States; because the constitutional uniformity enjoined in respect to duties and imposts is as real and obligatory upon the States, in the absence of all legislation by congress, as if the uniformity had been made by the legislation of congress; and that such constitutional uniformity is interfered with and destroyed by any State imposing any tax upon the intercourse of persons from State to State, or from foreign countries to the United States.

8. That the power in congress to regulate commerce with foreign nations and among the several States, includes navigation upon the high seas, and in the bays, harbors, lakes, and navigable waters within the United States, and that any tax by a State in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant.

9. That the States of this Union may, in the exercise of their police powers, pass quarantine and health laws, interdicting vessels coming from foreign ports, or ports within the United States, from landing passengers and goods, prescribe the places and time for vessels to quarantine, and impose penalties upon persons for violating the same; and that such laws, though affecting commerce in its transit, are not regulations of commerce prescribing terms upon which merchandise and persons shall be admitted into the ports of the United States, but precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound; and that the States may, in the exercise of such police power, without any violation of the power in congress to regulate commerce, exact from the owner or consignee of a quarantined vessel, and from the passengers on board of her, such fees as will pay to the State the cost of their detention and of the purification of the vessel, cargo, and apparel of the persons on board. . . .

[Chief Justice Taney, with whom Justice Nelson concurred, and Justices Daniel and Woodbury delivered dissenting opinions.]

COOLEY v. THE BOARD OF WARDENS OF THE PORT OF PHILADELPHIA.

12 Howard, 299. Decided 1851.

THE case is stated in the opinion of the court. . . .

CURTIS, J., delivered the opinion of the court.

These cases are brought here by writs of error to the supreme court of the commonwealth of Pennsylvania.

They are actions to recover half-pilotage fees under the 29th section of the act of the legislature of Pennsylvania, passed on the second day of March, 1803. The plaintiff in error alleges that the highest court of the State has decided against a right claimed by him under the constitution of the United States. That right is, to be exempted from the payment of the sums of money, demanded pursuant to the state law above referred to, because that law contravenes several provisions of the constitution of the United States.

The particular section of the State law drawn in question is as follows: "That every ship or vessel arriving from, or bound to any foreign port or place, and every ship or vessel of the burden of seventy-five tons or more, sailing from, or bound to any port not within the River Delaware, shall be obliged to receive a pilot. And it shall be the duty of the master of every such ship or vessel, within thirty-six hours next after the arrival of such ship or vessel at the city of Philadelphia, to make report to the master-warden of the name of such ship or vessel, her draught of water, and the name of the pilot who shall have conducted her to the port. And when any such vessel shall be outward bound, the master of such vessel shall make known to the wardens the name of such vessel, and of the pilot who is to conduct her to the capes, and her draught of water at that time. And it shall be the duty of the wardens to enter every such vessel in a book to be by them kept for that purpose, without fee or reward. And if the master of any ship or vessel shall neglect to make such report, he shall forfeit and pay the sum of $60. And if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner, or consignee of such vessel shall forfeit and pay to the warden aforesaid, a sum equal to the half-pilotage of such ship or vessel, to the use of the Society for the Relief, etc., to be recovered as pilotage in the manner hereinafter directed: Provided always, that where it shall appear to the warden that in case of an inward bound vessel,

a pilot did not offer before she had reached Reedy Island; or, in case of an outward bound vessel, that a pilot could not be obtained for twenty-four hours after such vessel was ready to depart, the penalty aforesaid, for not having a pilot, shall not be incurred." This is one section of "An Act to establish a Board of Wardens for the Port of Philadelphia, and for the Regulation of Pilots and Pilotages, etc.," and the scope of the act is, in conformity with the title, to regulate the whole subject of the pilotage of that port.

We think this particular regulation concerning half-pilotage fees is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial States and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Numerous laws of this kind are cited in the learned argument of the counsel for the defendant in error; and their fitness, as part of a system of pilotage, in many places, may be inferred from their existence in so many different States and countries. Like other laws, they are framed to meet the most usual cases, *quæ frequentius accidunt;* they rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation, by taking on board a person peculiarly skilled to encounter or avoid them; upon the policy of discouraging the commanders of vessels from refusing to receive such persons on board at the proper times and places; and upon the expediency, and even intrinsic justice, of not suffering those who have incurred labor, and expense, and danger, to place themselves in a position to render important service generally necessary, to go unrewarded, because the master of a particular vessel either rashly refuses their proffered assistance, or, contrary to the general experience, does not need it. There are many cases, in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial States and countries have made an offer of pilotage service one of those cases; and we cannot pronounce a law which does this to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage, as to be deemed, for this cause, a covert attempt to legislate upon another subject under the appearance of legislating on this one.

It is urged that the second section of the act of the legislature of Pennsylvania, of the 11th of June, 1832, proves that the State had other objects in view than the regulation of pilotage. That section is as follows:—

"And be it further enacted, by the authority aforesaid, that

from and after the first day of July next, no health-fee or half-pilotage shall be charged on any vessel engaged in the Pennsylvania coal trade."

It must be remembered, that the fair objects of a law imposing half-pilotage when a pilot is not received, may be secured, and at the same time some classes of vessels exempted from such charge. Thus, the very section of the act of 1803, now under consideration, does not apply to coasting vessels of less burden than seventy-five tons, nor to those bound to, or sailing from, a port in the River Delaware. The purpose of the law being to cause masters of such vessels as generally need a pilot, to secure one, and to secure to the pilots a fair remuneration for cruising in search of vessels, or waiting for employment in port, there is an obvious propriety in having reference to the number, size, and nature of employment of vessels frequenting the port; and it will be found, by an examination of the different systems of these regulations, which have from time been made in this and other countries, that the legislative discretion has been constantly exercised in making discriminations, founded on differences both in the character of the trade, and the tonnage of vessels engaged therein.

We do not perceive anything in the nature or extent of this particular discrimination in favor of vessels engaged in the coal trade, which would enable us to declare it to be other than a fair exercise of legislative discretion, acting upon the subject of the regulation of the pilotage of this port of Philadelphia, with a view to operate upon the masters of those vessels, who, as a general rule, ought to take a pilot, and with the further view of relieving from the charge of half-pilotage such vessels as from their size, or the nature of their employment, should be exempted from contributing to the support of pilots, except so far as they actually receive their services. In our judgment, though this law of 1832 has undoubtedly modified the 29th section of the act of 1803, and both are to be taken together as giving the rule on this subject of half-pilotage, yet this change in the rule has not changed the nature of the law, nor deprived it of the character and attributes of a law for the regulation of pilotage.

Nor do we consider that the appropriation of the sums received under this section of the act, to the use of the society for the relief of distressed and decayed pilots, their widows and children, has any legitimate tendency to impress on it the character of a revenue law. Whether these sums shall go directly to the use of the individual pilots by whom the service is tendered, or shall form a common fund, to be administered by trustees for the benefit of

such pilots and their families as may stand in peculiar need of it, is a matter resting in legislative discretion, in the proper exercise of which the pilots alone are interested.

For these reasons, we cannot yield our assent to the argument that this provision of law is in conflict with the second and third clauses of the tenth section of the first article of the constitution, which prohibit a State, without the assent of congress, from laying any imposts or duties on imports or exports, or tonnage. This provision of the constitution was intended to operate upon subjects actually existing and well understood when the constitution was formed. Imposts and duties on imports, exports, and tonnage were then known to the commerce of the civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial States enforced their pilot-laws, as they were from charges for wharfage or towage, or any other local port-charges for services rendered to vessels or cargoes; and to declare that such pilot-fees or penalties are embraced within the words imposts or duties on imports, exports, or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who use this language. It cannot be denied that a tonnage duty, or an impost on imports or exports, may be levied under the name of pilot dues or penalties; and certainly it is the thing, and not the name, which is to be considered. But, having previously stated that, in this instance, the law complained of does not pass the appropriate line which limits laws for the regulation of pilots and pilotage, the suggestion that this law levies a duty on tonnage or on imports or exports is not admissible; and, if so, it also follows that this law is not repugnant to the first clause of the eighth section of the first article of the constitution, which declares that all duties, imposts, and excises shall be uniform throughout the United States; for, if it is not to be deemed a law levying a duty, impost, or excise, the want of uniformity throughout the United States is not objectionable. Indeed, the necessity of conforming regulations of pilotage to the local peculiarities of each port, and the consequent impossibility of having its charges uniform throughout the United States, would be sufficient of itself to prove that they could not have been intended to be embraced within this clause of the constitution; for it cannot be supposed uniformity was required, when it must have been known to be impracticable.

It is further objected that this law is repugnant to the fifth clause of the ninth section of the first article of the constitution,

namely: "No preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another; nor shall vessels, to or from one State, be obliged to enter, clear, or pay duties in another."

But, as already stated, pilotage fees are not duties within the meaning of the constitution; and, certainly, Pennsylvania does not give a preference to the port of Philadelphia, by requiring the masters, owners, or consignees of vessels sailing to or from that port, to pay the charges imposed by the twenty-ninth section of the act of 1803. It is an objection to, and not a ground of preference of a port, that a charge of this kind must be borne by vessels entering it; and, accordingly, the interests of the port require, and generally produce, such alleviations of these charges as its growing commerce from time to time renders consistent with the general policy of the pilot laws. This State, by its act of the 24th of March, 1851, has essentially modified the law of 1803, and further exempted many vessels from the charge now in question. Similar changes may be observed in the laws of New York, Massachusetts, and other commercial States, and they undoubtedly spring from the conviction that burdens of this kind, instead of operating to give a preference to a port, tend to check its commerce, and that sound policy requires them to be lessened and removed as early as the necessities of the system will allow.

In addition to what has been said respecting each of these constitutional objections to this law, it may be observed that similar laws have existed and been practised on in the States since the adoption of the federal constitution; that, by the act of the 7th of August, 1789, 1 Stats. at Large, 54, congress declared that all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States, etc.; and that this contemporaneous construction of the constitution since acted on with such uniformity in a matter of much public interest and importance, is entitled to great weight, in determining whether such a law is repugnant to the constitution, as levying a duty not uniform throughout the United States, or, as giving a preference to the ports of one State over those of another, or, as obliging vessels to or from one State to enter, clear, or pay duties in another. Stuart v. Laird, 1 Cranch, 299; Martin v. Hunter, 1 Wheat., 304; Cohens v. The Commonwealth of Virginia, 6 Wheat., 264; Prigg v. The Commonwealth of Pennsylvanina, 16 Pet., 621.

The opinion of the court is, that the law now in question is

not repugnant to either of the above-mentioned clauses of the constitution.

It remains to consider the objection that it is repugnant to the third clause of the eighth section of the first article. "The congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the constitution.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. Accordingly, the first congress assembled under the constitution passed laws, requiring the masters of ships and vessels of the United States to be citizens of the United States, and established many rules for the government and regulation of officers and seamen. 1 Stats. at Large, 55, 131. These have been from time to time added to and changed, and we are not aware that their validity has been questioned.

Now, a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage-ground, is the temporary master charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons engaged in navigation, but he occupies a most important and responsible place among those thus engaged. And if congress has power to regulate the seamen who assist the pilot in the management of the vessel, a power never denied, we can perceive no valid reason why the pilot should be beyond the reach of the same power. It is true that, according to the usages of modern commerce on the ocean, the pilot is on board only during a part of the voyage between ports of different States, or between ports of the United States and foreign countries; but if he is on board for such a purpose and during so

much of the voyage as to be engaged in navigation, the power to regulate navigation extends to him while thus engaged, as clearly as it would if he were to remain on board throughout the whole passage, from port to port. For it is a power which extends to every part of the voyage, and may regulate those who conduct or assist in conducting navigation in one part of a voyage as much as in another part, or during the whole voyage.

Nor should it be lost sight of, that this subject of the regulation of pilots and pilotage has an intimate connection with, and an important relation to, the general subject of commerce with foreign nations and among the several States, over which it was one main object of the constitution to create a national control. Conflicts between the laws of neighboring States, and discriminations favorable or adverse to commerce with particular foreign nations, might be created by state laws regulating pilotage, deeply affecting that equality of commercial rights, and that freedom from state interference, which those who formed the constitution were so anxious to secure, and which the experience of more than half a century has taught us to value so highly. The apprehension of this danger is not speculative merely. For, in 1837, congress actually interposed to relieve the commerce of the country from serious embarrassment, arising from the laws of different States, situate upon waters which are the boundary between them. This was done by an enactment of the 2d of March, 1837,[1] in the following words:—

"Be it enacted, that it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters, to pilot said vessel to or from said port, any law, usage, or custom to the contrary notwithstanding."

The act of 1789, 1 Stats. at Large, 54, already referred to, contains a clear legislative exposition of the constitution by the first congress, to the effect that the power to regulate pilots was conferred on congress by the constitution; as does also the act of March the 2d, 1837, the terms of which have just been given. The weight to be allowed to this contemporaneous construction, and the practice of congress under it, has, in another connection, been adverted to. And a majority of the court are of opinion, that a regulation of pilots is a regulation of commerce, within the grant to congress of the commercial power, contained in the third clause of the eighth section of the first article of the constitution.

[1] 5 Stats. at Large, 153.

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The act of congress of the 7th of August, 1789, § 4, is as follows:—

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress."

If the law of Pennsylvania, now in question, had been in existence at the date of this act of congress, we might hold it to have been adopted by congress, and thus made a law of the United States, and so valid. Because this act does, in effect, give the force of an act of congress, to the then existing state laws on this subject, so long as they should continue unrepealed by the State which enacted them.

But the law on which these actions are founded, was not enacted till 1803. What effect then can be attributed to so much of the act of 1789 as declares that pilots shall continue to be regulated in conformity "with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress"?

If the States were divested of the power to legislate on this subject by the grant of the commercial power to congress, it is plain this act could not confer upon them power thus to legislate. If the constitution excluded the States from making any law regulating commerce, certainly congress cannot regrant, or in any manner reconvey to the States that power. And yet this act of 1789 gives its sanction only to laws enacted by the States. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a State acting in its legislative capacity, can be deemed a law enacted by a State; and if the State has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views, we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to congress did per se deprive the States of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to congress does not contain any terms

which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded, it must be because the nature of the power thus granted to congress requires that a similar authority should not exist in the States. If it were conceded on the one side that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the constitution (Federalist, No. 32), and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations. Sturges v. Crowninshield, 4 Wheat., 193; Houston v. Moore, 5 Wheat., 1; Wilson v. Blackbird Creek Co., 2 Pet., 251.

The diversities of opinion, therefore, which have existed on this subject have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by congress. Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit

only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain. The act of 1789 contains a clear and authoritative declaration by the first congress, that the nature of this subject is such that until congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulation, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789, as declares that pilots shall continue to be regulated "by such laws as the States may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the States a power to legislate, of which the constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. How, then, can we say that, by the mere grant of power to regulate commerce, the States are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of congress must be exclusive? This would be to affirm that the nature of the power is, in this case, something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands, in all cases, exclusive legislation by congress, while the nature of one of the subjects of that power, not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the States, in conformity with the circumstances of the ports within their limits. In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more ex-

tensive by affirming of the power, what is not true of its subject now in question.

It is the opinion of a majority of the court that the mere grant to congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that although congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of congress, or may be regulated by the States in the absence of all congressional legislation; nor to the general question, how far any regulation of a subject by congress may be deemed to operate as an exclusion of all legislation by the States upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular subject in the state in which the legislation of congress has left it. We go no further.

We have not adverted to the practical consequences of holding that the States possess no power to legislate for the regulation of pilots, though in our apprehension these would be of the most serious importance. For more than sixty years this subject has been acted on by the States, and the systems of some of them created and of others essentially modified during that period. To hold that pilotage fees and penalties demanded and received during that time have been illegally exacted, under color of void laws, would work an amount of mischief which a clear conviction of constitutional duty, if entertained, must force us to occasion, but which could be viewed by no just mind without deep regret. Nor would the mischief be limited to the past. If congress were now to pass a law adopting the existing state laws, if enacted without authority, and in violation of the constitution, it would seem to us to be a new and questionable mode of legislation.

If the grant of commercial power in the constitution has deprived the States of all power to legislate for the regulation of pilots, if their laws on this subject are mere usurpations upon the exclusive power of the general government, and utterly void, it may be doubted whether congress could, with propriety, recognize them as laws, and adopt them as its own acts; and how are the legislatures of the States to proceed in future, to watch over and amend these laws, as the progressive wants of a growing commerce will require, when the members of those legislatures are

made aware that they cannot legislate on this subject without violating the oaths they have taken to support the constitution of the United States?

We are of opinion that this state law was enacted by virtue of a power, residing in the State to legislate, that it is not in conflict with any law of congress; that it does not interfere with any system which congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the supreme court of Pennsylvania in each case must be affirmed.

McLean, J., and Wayne, J., dissented; and Daniel, J., although he concurred in the judgment of the court, yet dissented from its reasoning.

[Messrs. Justices McLean and Daniel delivered separate opinions.]

CASE OF THE STATE FREIGHT TAX.

READING RAILROAD COMPANY v. PENNSYLVANIA.

15 Wallace, 232. Decided 1872.

[The facts are sufficiently stated in the opinion of the court.]

Mr. Justice Strong delivered the opinion of the court.

We are called upon, in this case, to review a judgment of the Supreme Court of Pennsylvania, affirming the validity of a statute of the State, which the plaintiffs in error allege to be repugnant to the Federal Constitution.

The case presents the question whether the statute in question,—so far as it imposes a tax upon freight taken up within the State and carried out of it, or taken up outside the State and delivered within it, or, in different words, upon all freight other than that taken up and delivered within the State,—is not repugnant to the provision of the Constitution of the United States which ordains "that Congress shall have power to regulate commerce with foreign nations and among the several States," or in conflict with the provision that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The question is a grave one. It calls upon us to trace the line, always difficult to be traced, between the limits of State sovereignty in imposing taxation, and the power and duty of the Federal government to protect and regulate interstate commerce. While, upon the one hand, it is of the utmost importance that the State should possess the power to raise revenue for all the purposes of a State government, by any means, and in any manner not inconsistent with the powers which the people of the States have conferred upon the General Government, it is equally important that the domain of the latter should be preserved free from invasion, and that no State legislation should be sustained which defeats the avowed purposes of the Federal Constitution, or which assumes to regulate, or control subjects committed by that Constitution exclusively to the regulation of Congress.

Before proceeding, however, to a consideration of the direct question whether the statute is in direct conflict with any provision of the Constitution of the United States, it is necessary to have a clear apprehension of the subject and the nature of the tax imposed by it. It has repeatedly been held that the constitutionality, or unconstitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of Bank of Commerce v. New York City,[1] in The Bank Tax Case,[2] Society for Savings v. Coite,[3] and Provident Bank v. Massachusetts.[4] In all these cases it appeared that the bank was required by the statute to pay the tax, but the decisions turned upon the question, what was the subject of the tax, upon what did the burden really rest, not upon the question from whom the State exacted payment into its treasury. Hence, where it appeared that the ultimate burden rested upon the property of the bank invested in United States securities, it was held unconstitutional, but where it rested upon the franchise of the bank, it was sustained.

Upon what, then, is the tax imposed by the act of August 25th, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the State treasurer for the use of the Commonwealth, "on each two thousand

[1] 2 Black, 620.
[2] 2 Wallace, 200.
[3] 6 Id., 594.
[4] Ib., 611.

pounds of freight so carried," a tax at the specified rate. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. And when it is observed that the act provides "where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried upon one line, and the whole tax shall be paid by such one of said companies as the State treasurer may select and notify thereof," no room is left for doubt. The provision demonstrates that the tax has no reference to the business of the companies. In the case of connected lines thousands of tons may be carried over the line of one company without any liability of that company to pay the tax. The State treasurer is to decide which of several shall pay the whole. There is still another provision in the act which shows that the burden of the tax was not intended to be imposed upon the companies designated by it, neither upon their franchises, their property, or their business. The provision is as follows: "Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith." Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway, but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority.[5] In view of these

[5] Vide Boyle v. The Reading Railroad Company, 54 Pennsylvania State, 310; Cumberland Valley Railroad Co.'s Appeal, 62 Id., 218.

provisions of the statute it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported, or upon the consignor or consignee of the freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the State treasury is, in effect, only a tax-gatherer. The practical operation of the law has been well illustrated by another[6] when commenting upon a statute of the State of Delaware very similar to the one now under consideration. He said, "The position of the carrier under this law is substantially that of one to whom public taxes are farmed out—who undertakes by contract to advance to the government a required revenue with power by suit or distress to collect a like amount out of those upon whom the tax is laid. The only imaginable difference is, that, in the case of taxes farmed out, the obligation to account to the government is voluntarily assumed by contract, and not imposed by law, as upon the carrier under this act; also, that different means are provided for raising the tax out of those ultimately chargeable with it."

Considering it, then, as manifest that the tax demanded by the act is imposed, not upon the company, but upon the freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities transported through the State, or from points without the State to points within it, or from points within the State to points without it, the act is a regulation of interstate commerce. Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the States. In his work on the Constitution,[7] Judge Story asserts that the sense in which

[6] Chancellor Bates in Clarke v. Philadelphia, Wilmington, and Baltimore Railroad Co.

[7] § 1057.

the word commerce is used in that instrument includes not only traffic, but intercourse and navigation. And in the Passenger Cases,[8] it was said: "Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the States it must have been principally by land when the Constitution was adopted.

Then, why is not a tax upon freight transported from State to State a regulation of interstate transportation, and, therefore, a regulation of commerce among the States? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the State, and in taking them out? The present case is the best possible illustration. The legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out, or taken up in other States and brought within her limits, shall pay a specified tax. The payment of that tax is a condition upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines. It would hardly be maintained, we think, that had the State established custom-houses on her borders, wherever a railroad or canal comes to the State line, and demanded at these houses a duty for allowing merchandise to enter or to leave the State upon one of those railroads or canals, such an imposition would not have been a regulation of commerce with her sister States. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand. The goods of no citizen of New York, New Jersey, Ohio, or of any other State, may be placed upon a canal, railroad, or steamboat

[8] 7 Howard, 416.

within the State for transportation any distance, either into or out of the State, without being subjected to the burden. Nor can it make any difference that the legislative purpose was to raise money for the support of the State government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate trade. We are not at this moment inquiring further than whether taxing goods carried because they are carried is a regulation of carriage. The State may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State. Nor is a rule prescribed for carriage of goods through, out of, or into a State any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal. Doubtless a State may regulate its internal commerce as it pleases. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the State.

We may notice here a position taken by the defendants in error, and stoutly defended in the argument, that the tax levied, instead of being a regulation of commerce, is compensation for the use of the works of internal improvement constructed under the authority of the State and by virtue of franchises granted by the State; in other words, that it is a toll for the use of the highways, a part of which, in right of her eminent domain, the State may order to be paid into her treasury. . . .

All this, however, is abstract and apart from the case before us. That the act of 1864 was not intended to assert a claim for the use of the public works, or a claim for a part of the tolls, is too apparent to escape observation. The tax was imposed upon freight carried by steamboat companies, whether incorporated by the State or not, and whether exercising privileges granted by the State or not. It reaches freight passing up and down the Delaware and the Ohio rivers carried by companies who derive no rights from grants of Pennsylvania, who are exercising no part of her eminent domain; and, as we have noticed heretofore, the tax is not proportioned to services rendered, or to the use made of canals or railways. It is the same whether the transportation be long or short. It must therefore be considered an exaction, in

right of alleged sovereignty, from freight transported, or the right of transportation out of, or into, or through the State—a burden upon interstate intercourse.

If, then, this is a tax upon freight carried between States, and a tax because of its transportation, and if such a tax is in effect a regulation of interstate commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States. It is not necessary to the present case to go at large into the much-debated question whether the power given to Congress by the Constitution to regulate commerce among the States is exclusive. In the earlier decisions of this court it was said to have been so entirely vested in Congress that no part of it can be exercised by a State.[1] It has, indeed, often been argued, and sometimes intimated, by the court that, so far as Congress has not legislated on the subject, the States may legislate respecting interstate commerce. Yet, if they can, why may they not add regulations to commerce with foreign nations beyond those made by Congress, if not inconsistent with them, for the power over both foreign and interstate commerce is conferred upon the Federal Legislature by the same words. And certainly it has never yet been decided by this court that the power to regulate interstate, as well as foreign commerce, is not exclusively in Congress. Cases that have sustained State laws, alleged to be regulations of commerce among the States, have been such as related to bridges or dams across streams wholly within a State, police or health laws, or subjects of a kindred nature, not strictly commercial regulations. The subjects were such, as in Gilman v. Philadelphia,[2] it was said "can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." However this may be, the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress.[3] Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons

[1] Gibbons v. Ogden, 9 Wheaton, 1; Passenger Cases, 7 Howard, 283.

[2] 3 Wallace, 713.

[3] Cooley v. Port Wardens, 12 Howard, 299; Gilman v. Philadelphia, supra; Crandall v. The State of Nevada, 6 Wallace, 42.

or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. The produce of Western States may thus be effectually excluded from Eastern markets, for though it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal government.

In Almy v. The State of California,[4] it was held by this court that a law of the State imposing a tax upon bills of lading for gold or silver transported from that State to any port or place without the State, was substantially a tax upon the transportation itself, and was therefore unconstitutional. True, the decision was rested on the ground that it was a tax upon exports, and subsequently, in Woodruff v. Parham,[5] the court denied the correctness of the reasons given for the decision; but they said at the same time the case was well decided for another reason, viz., that such a tax was a regulation of commerce—a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another, which is within the rule laid down in Crandall v. Nevada,[6] and with the authority of Congress to regulate commerce among the States.

In Crandall v. The State of Nevada, where it appeared that the legislature of the State had enacted that there should "be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage-coach, or other vehicle engaged or employed in the business of transporting passengers for hire," and required the proprietors, owners, and corporations so engaged to make monthly reports of the number of persons carried, and to pay the tax, it was ruled that though required to be paid by the carriers, the tax was a tax upon passengers, for the privilege of being carried out of the State, and not a tax on the business of the carriers. For that reason it was held that the law imposing it was invalid, as in conflict with the Constitution of the United States. A majority of the court, it is true, declined to rest the decision upon the ground that the tax was a regulation of interstate commerce, and therefore beyond the power of the State to impose, but all the judges agreed

[4] 24 Howard, 169.
[5] 8 Wallace, 123.
[6] 6 Id., 35.

that the State law was unconstitutional and void. The Chief Justice and Mr. Justice Clifford thought the judgment should have been placed exclusively on the ground that the act of the State legislature was inconsistent with the power conferred upon Congress to regulate commerce among the several States, and it does not appear that the other judges held that it was not thus inconsistent. In any view of the case, however, it decides that a State cannot tax persons for passing through, or out of it. Interstate transportation of passengers is beyond the reach of a State legislature. And if State taxation of persons passing from one State to another, or a State tax upon interstate transportation of passengers is unconstitutional, a fortiori, if possible, is a State tax upon the carriage of merchandise from State to State in conflict with the Federal Constitution. Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is pro tanto a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established that no State can impose a tax upon freight transported from State to State, or upon the transporter because of such transportation.

But while holding this, we recognize fully the power of each State to tax at its discretion its own internal commerce, and the franchises, property, or business of its own corporations, so that interstate intercourse, trade, or commerce, be not embarrassed or restricted. That must remain free.

The conclusion of the whole is that, in our opinion, the act of the legislature of Pennsylvania of August 25th, 1864, so far as it applies to articles carried through the State, or articles taken up in the State and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void.

Judgment reversed, and the record is remitted for further proceedings in accordance with this opinion.

Mr. Justice Swayne (with whom concurred Mr. Justice Davis), dissenting.

I dissent from the opinion just read. In my judgment, the tax is imposed upon the business of those required to pay it. The tonnage is only the mode of ascertaining the extent of the business. That no discrimination is made between freight carried wholly within the State, and that brought into or carried through or out of it, sets this, as I think, in a clear light, and is conclusive on the subject.

PENSACOLA TELEGRAPH COMPANY v. WESTERN UNION TELEGRAPH COMPANY.

96 U. S., 1. Decided 1877.

APPEAL from the Circuit of the United States for the Northern District of Florida. . . . [The Pensacola Telegraph Co. was incorporated in 1866 by the State of Florida, and granted the exclusive right to establish and maintain telegraph lines in certain counties of Florida. Later, in 1874, the legislature of Florida empowered a railroad company to erect a telegraph line within the territory of the exclusive grant to the Pensacola Company. In 1866, prior to the passage of the first of these acts, Congress had enacted that telegraph lines might be established "through and over any portion of the public domain of the United States, over and along any of the military and post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams and waters of the United States." In June, 1867, the defendants had filed with the Postmaster-General their acceptance of the terms of the act, as required by law. In 1874 the railroad company above mentioned authorized the defendant to erect a telegraph line upon its right of way, whereupon the plaintiff sought to enjoin the construction and use of the line.]

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Since the case of Gibbons v. Ogden (9 Wheat., 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal system known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steam-boat, from the coach and the steam-boat to the railroad, and from the railroad to the telegraph, as these new agencies are

successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were entrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic corespondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

It is not only important to the people, but to the government. By means of it the heads of departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile State legislation. In fact, from the beginning, it seems to have been assumed that Congress might aid in developing the system; for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago, with money appropriated by Congress for that purpose (5 Stat., 618); and large donations of land and money have since been made to aid in the construction of other lines (12 Stat., 489, 772; 13 id., 365; 14 id., 292). It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate

legislation, to prevent the States from placing obstructions in the way of its usefulness.

The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.

The State of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. This embraces the two westernmost counties of the State, and extends from Alabama to the Gulf. No telegraph line can cross the State from east to west, or from north to south, within these counties, except it passes over this territory. Within it is situated an important seaport, at which business centers, and with which those engaged in commercial pursuits have occasion more or less to communicate. The United States have there also the necessary machinery of the national government. They have a navy-yard, forts, custom-houses, courts, post-offices, and the appropriate officers for the enforcement of the laws. The legislation of Florida, if sustained, excludes all commercial intercourse by telegraph between the citizens of the other States and those residing upon this territory, except by the employment of this corporation. The United States cannot communicate with their own officers by telegraph except in the same way. The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction.

It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The statute of July 24, 1866, in effect, amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege. To this extent, certainly, the statute is

a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide, that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.

It is insisted, however, that the statute extends only to such military and post roads as are upon the public domain; but this, we think, is not so. The language is, "Through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States." There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post roads, and the navigable waters of the United States. These are all within the dominion of the national government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted.

The State law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of Congress. To that extent it is, therefore, inoperative as against a corporation of another State entitled to the privileges of the act of Congress. Such being the case, the charter of the Pensacola Company does not exclude the Western Union Company from the occupancy of the right of way of the Pensacola and Louisville Railroad Company under the arrangement made for that purpose. . . .

Upon principles of comity, the corporations of one State are permitted to do business in another, unless it conflicts with the

law, or unjustly interferes with the rights of the citizens of the State into which they come. Under such circumstances, no citizen of a State can enjoin a foreign corporation from pursuing its business. Until the State acts in its sovereign capacity, individual citizens cannot complain. The State must determine for itself when the public good requires that its implied assent to the admission shall be withdrawn. Here, so far from withdrawing its assent, the State, by its legislation of 1874, in effect, invited foreign telegraph corporations to come in. Whether that legislation, in the absence of congressional action, would have been sufficient to authorize a foreign corporation to construct and operate a line within the two counties named, we need not decide; but we are clearly of the opinion, that, with such action and a right of way secured by private arrangement with the owner of the land, this defendant corporation cannot be excluded by the present complainant.

Decree affirmed.

MR. JUSTICE FIELD and MR. JUSTICE HUNT dissented. . . .

GLOUCESTER FERRY COMPANY v. PENNSYLVANIA.

114 U. S., 196. Decided 1885.

[The Gloucester Ferry Company, a New Jersey corporation, established a ferry in 1865 between Gloucester, New Jersey, and Philadelphia. At each place it had a dock; the one at Gloucester it owns, the one at Philadelphia it leases. Its entire business consists in ferrying passengers and freight across the river. It has never had any property, real or personal, in Pennsylvania, other than the lease of the dock mentioned. Its boats are registered at the port of Camden, New Jersey, and remain in Pennsylvania only long enough to discharge and receive passengers and freight. On June, 7, 1879, a statute was passed in Pennsylvania imposing taxes, with certain exceptions, on all corporations, domestic or foreign, doing business or employing capital in Pennsylvania. In July, 1880, the State of Pennsylvania stated an account against the company showing the sum of $2,593.96 to be due the Commonwealth for taxes from 1865 to 1879. An appeal was taken to the Court of Common Pleas of Philadelphia.]

The Court of Common Pleas held that the taxes could not be

lawfully levied, for there was no other business carried on by the company in Pennsylvania except the landing and receiving of passengers and freight, which is a part of the commerce of the country, and protected by the Constitution from the imposition of burdens by State legislation. It, therefore, gave judgment in favor of the company. The case being carried on a writ of error to the Supreme Court of the State, the judgment was reversed and judgment ordered in favor of the Commonwealth for the amount mentioned. To review this latter judgment, the case was brought here. . . .

Mr. Justice Field delivered the opinion of the court. He stated the facts as above recited, and continued:—

The Supreme Court of the State, in giving its decision in this case, stated that the single question presented for consideration was whether the company did business within the State of Pennsylvania during the period for which the taxes were imposed; and it held that it did do business there because it landed and received passengers and freight at its wharf in Philadelphia, observing that its whole income was derived from the transportation of freight and passengers from its wharf at Gloucester to its wharf at Philadelphia, and from its wharf at Philadelphia to its wharf at Gloucester; that at each of these points its main business, namely, the receipt and landing of freight and passengers, was transacted; that for such business it was dependent as much upon the one place as upon the other; that, as it could hold the wharf at Gloucester, which it owned in fee, only by purchase by virtue of the statutory will of the Legislature of New Jersey, so it could hold by lease the one in Philadelphia only by the implied consent of the Legislature of the Commonwealth; and that, therefore, it "was dependent equally, not only for its business, but its power to do that business, upon both States, and might, therefore, be taxed by both." 98 Penn. St., 105, 116.

As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation.

It matters not that the transportation is made in ferry-boats, which pass between the States every hour of the day. The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its nonaction is a declaration that it shall remain free from burdens imposed by State legislation. Otherwise there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products, and against those of other States. It was from apprehension of such conflicting and discriminating State legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the States was vested in Congress.

Nor does it make any difference whether such commerce is carried on by individuals or by corporations. Welton v. Missouri, 91 U. S., 275; Mobile v. Kimball, 102 U. S., 691. As was said in Paul v. Virginia, 8 Wall., 168, at the time of the formation of the Constitution, a large part of the commerce of the world

was carried on by corporations; and the East India Company, the Hudson Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company were mentioned as among the corporations which, from the extent of their operations, had become celebrated throughout the commercial world. The grant of power is general in its terms, making no reference to the agencies by which commerce may be carried on. It includes commerce by whomsoever conducted, whether by individuals or by corporations. At the present day, nearly all enterprises of a commercial character, requiring for their successful management large expenditures of money, are conducted by corporations. The usual means of transportation on the public waters, where expedition is desired, are vessels propelled by steam; and the ownership of a line of such vessels generally requires an expenditure exceeding the resources of single individuals. Except in rare instances, it is only by associated capital furnished by persons united in corporations, that the requisite means are provided for such expenditures.

As to the second reason given for the decision below, that the company could not lease its wharf in Philadelphia except by the implied consent of the Legislature of the Commonwealth, and thus is dependent upon the Commonwealth to do its business, and therefore can be taxed there, it may be answered that no foreign or interstate commerce can be carried on with the citizens of a State without the use of a wharf, or other place within its limits on which passengers and freight can be landed and received, and the existence of power in a State to impose a tax upon the capital of all corporations engaged in foreign or interstate commerce for the use of such places would be inconsistent with and entirely subversive of the power vested in Congress over such commerce. Nearly all the lines of steamships and of sailing vessels between the United States and England, France, Germany, and other countries of Europe, and between the United States and South America, are owned by corporations; and if by reason of landing or receiving passengers and freight at wharves, or other places in a State, they can be taxed by the State on their capital stock on the ground that they are thereby doing business within her limits, the taxes which may be imposed may embarrass, impede, and even destroy such commerce with the citizens of the State. If such a tax can be levied at all, its amount will rest in the discretion of the State. It is idle to say that the interests of the State would prevent oppressive taxation. Those engaged in foreign and interstate commerce are not bound to trust to

its moderation in that respect; they require security. And they may rely on the power of Congress to prevent any interference by the State until the act of commerce, the transportation of passengers and freight, is completed. The only interference of the State with the landing and receiving of passengers and freight, which is permissible, is confined to such measures as will prevent confusion among the vessels, and collision between them, insure their safety and convenience, and facilitate the discharge or receipt of their passengers and freight, which fall under the general head of port regulations, of which we shall presently speak.

It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to State taxation, provided always it be within the jurisdiction of the State. As said by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat., 316, 429, "all subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident." . . . [Here follows a discussion of Hays v. Pacific Mail Steamship Co., 17 Howard, 596; Morgan v. Parham, 16 Wallace, 471; St. Louis v. The Ferry Co., 11 Wallace, 423, and Railroad Co. v. Pennsylvania, 15 Wallace, 300.]

In the recent case of Commonwealth of Pennsylvania v. Standard Oil Co., 101 Penn. St., 119, the liability of foreign corporations doing business within that State is elaborately considered by its Supreme Court. The corporation was doing business there, and it was contended on the part of the Commonwealth that the tax should be imposed upon all of the capital stock of the company; while on the other side it was urged that only so much of the stock was intended, by the statute, to be taxed as was represented by property of the company invested and used in the State. In giving its decision the court said that it had been repeatedly decided and was settled law that a tax upon the capital stock of a company is a tax upon its property and assets (citing to that effect a large number of decisions); that it was undoubtedly competent for the legislature to lay a franchise or license tax upon foreign corporations for the privilege of doing business within the State, but that the tax in that case was in no sense a license tax; that the State had never granted a license to the Standard Oil Company to do business there, but merely taxed its property, that is, its capital stock, to the extent that it brought such property within its borders in the transaction of its

business; that the position of the Commonwealth, that a foreign corporation entering the State to do business brought its entire capital, was ingenious but unsound; that it was a fundamental principle that, in order to be taxed, the person must have a domicil in the State, and the thing must have a situs therein; that persons and property in transitu could not be taxed; that the domicil of a corporation was in the State of its origin and it could not emigrate to another sovereignty; that the domicil of the Standard Oil Company was in Ohio, and when it sent its agents into the State to transact business it no more entered the State in point of fact than any other foreign corporation, firm, or individual who sent an agent there to open an office or branch house, or brought its capital there constructively; that it would be as reasonable to assume that a business firm in Ohio brought its entire capital there because it sent its agent to establish a branch of its business, as to hold that the Standard Oil Company, by employing certain persons in the State to transact a portion of its business, thereby brought all its property or capital stock within the jurisdiction of the State; that there was neither reason nor authority for such a proposition; that the company was taxable only to the extent that it brought its property within the State; and that its capital stock, as mentioned in the act of the legislature, must be construed to mean so much of the capital stock as was measured by the property actually brought within the State by the company in the transaction of its business. The justice who delivered the opinion of the court added, speaking for himself, that he conceded the power of the Commonwealth to exclude foreign corporations altogether from her borders, or to impose a license tax so heavy as to amount to the same thing; but he denied, great and searching as her taxing power is, that she could tax either persons or property not within her jurisdiction. "A foreign corporation," he said, "'has no domicil here, and can have none; hence it cannot be said to draw to itself the constructive possession of its property located elsewhere. There are a large number of foreign insurance companies doing business here under license from the State. Some of them have a very large capital. It is usually invested at the domicil of the company. If the position of the Commonwealth is correct, she can tax the entire property of the Royal Insurance Company, although the same is located almost wholly in England, or the assets of the New York Mutual, located in New York."

Under this decision there is no property held by the Gloucester

Ferry Company, which can be the subject of taxation in Pennsylvania, except the lease of the wharf in that State. Whether that wharf is taxed to the owner or to the lessee it matters not, for no question here is involved in such taxation. It is admitted that it could be taxed by the State according to its appraised value. The ferry-boats of the company are registered at the port of Camden in New Jersey, and according to the decisions in Hays v. The Pacific Mail Steamship Co., and in Morgan v. Parham, they can be taxed only at their home port. According to the decision in the Standard Oil Company case, and by the general law on the subject, the company has no domicil in Pennsylvania, and its capital stock representing its property is held outside of its limits. It is solely, therefore, for the business of the company in landing and receiving passengers at the wharf in Philadelphia that the tax is laid, and that business, as already said, is an essential part of the transportation between the States of New Jersey and Pennsylvania, which is itself interstate commerce. While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce. This proposition is supported by many adjudications. . . .

[Here follow statements of Gibbons v. Ogden, 9 Wheaton, 1; Steamship Co. v. Port Wardens, 6 Wallace, 31; Reading Railroad Co. v. Pennsylvania, 15 Wallace, 232; and Henderson v. The Mayor of New York, 92 U. S., 259.]

These cases would seem to be decisive of the character of the business which is the subject of taxation in the present case. Receiving and landing passengers and freight is incident to their transportation. Without both there could be no such thing as their transportation across the river Delaware. The transportation, as to passengers, is not completed until, as said in the Henderson case, they are disembarked at the pier of the city to which they are carried; and, as to freight, until it is landed upon such pier. And all restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are

so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.

The cases where a tax or toll upon vessels is allowed to meet the expenses incurred in improving the navigation of waters traversed by them, as by the removal of rocks, the construction of dams and locks to increase the depth of water and thus extend the line of navigation, or the construction of canals around falls, rest upon a different principle. The tax in such cases is considered merely as compensation for the additional facilities thus provided in the navigation of the waters. Kellogg v. Union Co., 12 Conn., 7; Thames Bank v. Lovell, 18 Conn., 500; McReynolds v. Smallhouse, 8 Bush, 447.

Upon similar grounds, what are termed harbor dues or port charges, exacted by the State from vessels in its harbors, or from their owners, for other than sanitary purposes, are sustained. We say for other than sanitary purposes; for the power to prescribe regulations to protect the health of the community, and prevent the spread of disease, is incident to all local municipal authority, however much such regulations may interfere with the movements of commerce. But, independently of such measures, the State may prescribe regulations for the government of vessels whilst in its harbors; it may provide for their anchorage or mooring, so as to prevent confusion and collision; it may designate the wharves at which they shall discharge and receive their passengers and cargoes and require their removal from the wharves when not thus engaged, so as to make room for other vessels. It may appoint officers to see that the regulations are carried out, and impose penalties for refusing to obey the directions of such officers; and it may impose a tax upon vessels sufficient to meet the expenses attendant upon the execution of the regulations. The authority for establishing regulations of this character is found in the right and duty of the supreme power of the State to provide for the safety, convenient use, and undisturbed enjoyment of property within its limits; and charges incurred in enforcing the regulations may properly be considered as compensation for the facilities thus furnished to the vessels. Vanderbilt v. Adams, 7 Cowen, 349, 351. Should such regulations interfere with the exercise of the commercial power of Congress, they may at any time be superseded by its action. It was not intended, however, by the grant to Congress to supersede or interfere with the power of the States to establish police regulations for the better protection and enjoyment of property. Sometimes, indeed, as remarked by Mr. Cooley, the line of distinction between what constitutes an

interference with commerce and what is a legitimate police regulation is exceedingly dim and shadowy, and he adds: "It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions if it shall be deemed advisable, and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded. Congress may establish police regulations as well as the States, confining their operations to the subjects over which it is given control by the Constitution; but as the general police power can better be exercised under the provisions of the local authority, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the National Congress, the regulations which are made by Congress do not often exclude the establishment of others by the State covering very many particulars." Cooley's Constitutional Limitations, 732.

The power of the States to regulate matters of internal police includes the establishment of ferries as well as the construction of roads and bridges. In Gibbons v. Ogden, Chief Justice Marshall said that laws respecting ferries, as well as inspection laws, quarantine laws, health laws, and laws regulating the internal commerce of the States, are component parts of an immense mass of legislation, embracing everything within the limits of a State not surrendered to the general government; but in this language he plainly refers to ferries entirely within the State, and not to ferries transporting passengers and freight between the States and a foreign country; for the power vested in Congress, he says, comprehends every species of commercial intercourse between the United States and foreign countries. No sort of trade, he adds, can be carried on between this country and another to which the power does not extend; and what is true of foreign commerce is also true of commerce between States over the waters separating them. Ferries between one of the States and a foreign country cannot be deemed, therefore, beyond the control of Congress under the commercial power. They are necessarily governed by its legislation on the importation and exportation of merchandise and the immigration of foreigners, that is, are subject to its regulation in that respect; and if they are not beyond the control of the commercial power of Congress, neither are ferries over waters separating States. Congress has passed various laws respecting such international and interstate ferries, the validity of which is not open to question. It has provided that vessels used exclusively as ferry-boats, carrying passengers, baggage, and mer-

chandise, shall not be required to enter and clear, nor shall their masters be required to present manifests, or to pay entrance or clearance fees, or fees for receiving or certifying manifests; "but they shall, upon arrival in the United States, be required to report such baggage and merchandise to the proper officer of the customs, according to law," Rev. Stat., § 2792; that the lights for ferry-boats shall be regulated by such rules as the Board of Supervising Inspectors of Steam Vessels shall prescribe, Rev. Stat., § 4233, Rule 7; that any foreign railroad company or corporation, whose road enters the United States by means of a ferry or tug-boat, may own such boat, and that it shall be subject to no other or different restrictions or regulations in such employment than if owned by a citizen of the United States, Rev. Stat., § 4370; that the hull and boilers of every ferry-boat propelled by steam shall be inspected, and provisions of law for the better security of life, which may be applicable to them, shall, by regulations of the supervising inspectors, be required to be complied with before a certificate of inspection be granted; and that they shall not be navigated without a licensed engineer and a licensed pilot, Rev. Stat., § 4426.

It is true that, from the earliest period in the history of the government, the States have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects, the States can more advantageously manage such inter-State ferries than the general government; and that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort, and convenience of the public. Still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the States bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the States of taxes or other burdens upon the commerce between them. Freedom from such impositions does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the States secured under the commercial power of Congress. Packet Co. v. Keokuk, 95 U. S., 80;

Packet Co. v. St. Louis, 100 U. S., 423; Vicksburg v. Tobin, 100 U. S., 430; Packet Co. v. Catlettsburg, 105 U. S., 559; Transportation Co. v. Parkersburg, 107 U. S., 691. That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property. How conflicting legislation of the two States on the subject of ferries on waters dividing them is to be met and treated is not a question before us for consideration. Pennsylvania has never attempted to exercise its power of establishing and regulating ferries across the Delaware River. Any one, so far as her laws, are concerned, is free, as we are informed, to establish such ferries as he may choose. No license fee is exacted from ferry-keepers. She merely exercises the right to designate the places of landing, as she does the places of landing for all vessels engaged in commerce. The question, therefore, respecting the tax in the present case is not complicated by any action of that State concerning ferries. However great her power, no legislation on her part can impose a tax on that portion of inter-State commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on.

It follows that upon the case stated the tax upon the ferry company was illegal and void.

The judgment of the Supreme Court of the State of Pennsylvania must, therefore, be reversed and the cause remanded for further proceedings in conformity with this opinion.

LEISY v. HARDIN.

135 U. S., 100. Decided 1890.

[Error to the Supreme Court of Iowa. The plaintiffs, who were brewers doing business at Peoria, Illinois, had shipped beer in sealed packages to Keokuk, Iowa, where it was offered for sale in the original packages. A certain quantity of the beer was seized by Hardin, the city marshal of Keokuk, under color of authority of the statutes of Iowa which forbade the manufacture or sale of intoxicating liquors, or keeping them with intent to sell, except for medicinal, chemical, pharmaceutical and sacramental purposes as allowed in the act. The plaintiffs brought

replevin against Hardin to recover the beer seized, and the local court gave judgment for the plaintiffs on the ground that the State enactment was invalid. This judgment was reversed by the Supreme Court of Iowa.]

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The power vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. Gibbons v. Ogden, 9 Wheat., 1; Brown v. Maryland, 12 Wheat., 419.

And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health and comforts of persons, and the protection of property so situated, yet a subject-matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action. Henderson v. Mayor of New York, 92 U. S., 259; Railroad Co. v. Husen, 95 U. S., 465; Walling v. Michigan, 116 U. S., 466; Robbins v. Shelby Taxing District, 120 U. S., 489. The power to regulate commerce among the States is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce between the States. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries, and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety, and welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of a power confided to the general government.

Where the subject-matter requires a uniform system between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States; but where, in relation to the subject matter, different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power. Cooley v. Port Wardens of Philadelphia, 12 How., 299.

It was stated in the 32d number of the Federalist that the States might exercise concurrent and independent power in all cases but three: First, where the power was lodged exclusively in the federal constitution; second, where it was given to the United States and prohibited to the States; third, where, from the nature and subjects of the power, it must be necessarily exercised by the national government exclusively. But it is easy to see that Congress may assert an authority under one of the granted powers, which would exclude the exercise by the States upon the same subject of a different but similar power, between which and that possessed by the general government no inherent repugnancy existed.

Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled. County of Mobile v. Kimball, 102 U. S., 691; Brown v. Houston, 114 U. S., 622, 631; Wabash, St. Louis, &c., Railway v. Illinois, 118 U. S., 557; Robbins v. Shelby Taxing District, 120 U. S., 489, 493.

That ardent spirits, distilled liquors, ale and beer, are subjects of exchange, barter and traffic, like any other commodity, in which a right of traffic exists, and are so recognized by the usages of the

commercial world, the laws of Congress and the decisions of courts, is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State? or when imported prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad, or from a sister State, so become part of the common mass of property within a State as to be subject to its unimpeded control?

In Brown v. Maryland (supra) the act of the state legislature drawn in question was held invalid as repugnant to the prohibition of the Constitution upon the States to lay any impost or duty upon imports or exports, and to the clause granting the power to regulate commerce; and it was laid down by the great magistrate who presided over this court for more than a third of a century, that the point of time when the prohibition ceases and the power of the State to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer; that as to the power to regulate commerce, none of the evils which proceeded from the feebleness of the federal government contributed more to the great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress; that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States; that that power was complete in itself, acknowledged no limitations other than those prescribed by the Constitution, was co-extensive with the subject on which it acts and not to be stopped at the external boundary of a State, but must be capable of entering its interior; that the right to sell any article imported was an inseparable incident to the right to import it, and that the principles expounded in the case applied equally to importations from a sister State. Manifestly this must be so, for the same public policy applied to commerce among the States as to foreign commerce, and not a reason could be assigned for confiding the power over the one which did not conduce to establish the propriety of confiding the power over the other. Story,

Constitution, § 1066. And although the precise question before us was not ruled in Gibbons v. Ogden and Brown v. Maryland, yet we think it was virtually involved and answered, and that this is demonstrated, among other cases, in Bowman v. Chicago & Northwestern Railway Co., 125 U. S., 465. In the latter case, section 1553 of the Code of the State of Iowa as amended by c. 143 of the acts of the twentieth General Assembly in 1886, forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without first being furnished with a certificate as prescribed, was declared invalid, because essentially a regulation of commerce among the States, and not sanctioned by the authority, express or implied, of Congress. The opinion of the court, delivered by Mr. Justice Matthews, the concurring opinion of Mr. Justice Field, and the dissenting opinion by Mr. Justice Harlan, on behalf of Mr. Chief Justice Waite, Mr. Justice Gray, and himself, discussed the question involved in all its phases; and while the determination of whether the right of transportation of an article of commerce from one State to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates was in terms reserved, yet the argument of the majority conducts irresistibly to that conclusion, and we think we cannot do better than repeat the grounds upon which the decision was made to rest. It is there shown that the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is beyond all question a constituent of commerce itself; that this was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States; that the power to prevent embarrassing restrictions by any State was the end desired; that the power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations; and that it would be absurd to suppose that the transmission of the subjects of trade from the State of the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the States. It is explained that where State laws alleged to be regulations of commerce among the States, have been sustained, they were laws which related to bridges or dams across streams, wholly within the State, or police or health laws, or to subjects of a kindred nature, not strictly of commercial regulation. But the transportation of passengers or of merchandise from one State to an-

other is in its nature national, admitting of but one regulating power; and it was to guard against the possibility of commercial embarrassments which would result if one State could directly or indirectly tax persons or property passing through it, or prohibit particular property from entrance into the State, that the power of regulating commerce among the States was conferred upon the federal government.

"If in the present case," said Mr. Justice Matthews, "the law of Iowa operated upon all merchandise sought to be brought from another State into its limits, there could be no doubt that it would be a regulation of commerce among the States," and he concludes that this must be so, though it applied only to one class of articles of a particular kind. The legislation of Congress on the subject of interstate commerce by means of railroads, designed to remove trammels upon transportation between different States, and upon the subject of the transportation of passengers and merchandise (Revised Statutes, sections 4252 to 4289, inclusive), including the transportation of nitroglycerine and other similar explosive substances, with the proviso that, as to them, "any State, territory, district, city or town within the United States" should not be prevented by the language used "from regulating or from prohibiting the traffic in or transportation of those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use or consumption therein," is referred to as indicative of the intention of Congress that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by States in particular cases by the express permission of Congress. It is said that the law in question was not an inspection law, the object of which "is to improve the quality of articles produced by the labor of a country, to fit them for exportation; or, it may be, for domestic use;" Gibbons v. Ogden, 9 Wheat., 1, 203; Turner v. Maryland, 107 U. S., 38, 55; nor could it be regarded as a regulation of quarantine or a sanitary provision for the purpose of protecting the physical health of the community; nor a law to prevent the introduction into the State of diseases, contagious, infectious, or otherwise. Articles in such a condition as tend to spread disease are not merchantable, are not legitimate subjects of trade and commerce, and the self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercise of power cannot be considered a regulation of commerce, prohibited by the Constitution; and the observa-

tions of Mr. Justice Catron, in The License Cases, 5 How., 504, 599, are quoted to the effect that what does not belong to commerce is within the jurisdiction of the police power of the State, but that which does belong to commerce is within the jurisdiction of the United States; that to extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the State to bring within the police power "any article of consumption that a State might wish to exclude, whether it belonged to that which was drunk or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the products of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded in effect by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing." And Mr. Justice Matthews thus proceeds, p. 493: "For the purpose of protecting its people against the evils of intemperance, it has the right to prohibit the manufacture within its limits of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other States or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective—until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be. . . . Can it be supposed that by omitting any express declaration on the subject, Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any de-

scription, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States." . . .

[Here follow extracts from the opinion of CHIEF JUSTICE TANEY in The License Cases, 5 Howard, 504.]

But conceding the weight properly to be ascribed to the judicial utterances of this eminent jurist, we are constrained to say that the distinction between subjects in respect of which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aids rather than regulations, does not appear to us to have been sufficiently recognized by him in arriving at the conclusions announced. That distinction has been settled by repeated decisions of this court, and can no longer be regarded as open to re-examination. After all, it amounts to no more than drawing the line between the exercise of power over commerce with foreign nations, and among the States, and the exercise of power over purely local commerce and local concerns.

The authority of Peirce v. New Hampshire, in so far as it rests on the view that the law of New Hampshire was valid because Congress has made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to.

The doctrine now firmly established is, as stated by Mr. Justice Field, in Bowman v. Chicago, &c. Railway Co., 125 U. S., 507, "that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers; erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States,

such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. Illustrations exemplifying the general rule are numerous. Thus we have held the following to be regulations of interstate commerce: A tax upon freight transported from State to State. Case of the State Freight Tax, 15 Wall., 232; a statute imposing a burdensome condition on ship-masters as a prerequisite to the landing of passengers, Henderson v. Mayor of New York, 92 U. S., 259; a statute prohibiting the driving or conveying of any Texas, Mexican or Indian cattle, whether sound or diseased, into the State between the first day of March and the first day of November in each year, Railroad Co. v. Husen, 95 U. S., 465; a statute requiring every auctioneer to collect and pay into the state treasury a tax on his sales, when applied to imported goods in the original packages by him sold for the importer, Cook v. Pennsylvania, 97 U. S., 566; a statute intended to regulate or tax, or to impose any other restrictions upon, the transmission of persons or property, or telegraphic messages, from one State to another, Wabash, St. Louis &c. Railway v. Illinois, 118 U. S., 557; a statute levying a tax upon non-resident drummers offering for sale or selling goods, wares or merchandise by sample, manufactured or belonging to citizens of other States, Robbins v. Shelby Taxing District, 120 U. S., 489.

[Here follow similar rules derived from decisions in County of Mobile v. Kimball, 102 U. S., 691; Escanaba Co. v. Chicago, 107

U. S., 678; Transportation Co. v. Parkersburg, 107 U. S., 691; Brown v. Houston, 114 U. S., 622; Morgan Steamship Co. v. Louisiana Board of Health, 118 U. S., 455; Smith v. Alabama, 124 U. S., 465; Nashville &c. Railway Co. v. Alabama, 128 U. S., 96; Kimmish v. Ball, 129 U. S., 217; Welton v. The State of Missouri, 91 U. S., 275; Walling v. Michigan, 116 U. S., 446; Patterson v. Kentucky, 97 U. S., 501; Webber v. Virginia, 103 U. S., 344; Mugler v. Kansas, 123 U. S., 623; Bartemeyer v. Iowa, 18 Wall., 129; Beer Company v. Massachusetts, 97 U. S., 25; Foster v. Kansas, 112 U. S., 201; Kidd v. Pearson, 128 U. S., 1; and Eilenbecker v. District Court of Plymouth County, 134 U. S., 31.]

These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government; but whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void.

In Mugler v. Kansas, supra, the court said (p. 662) that it could not "shut out of view the fact, within the knowledge of all, that the public health, the public morals and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism and crime existing in the country are, in some degree at least, traceable to this evil." And that "if in the judgment of the legislature [of a State] the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. . . . Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage." Undoubtedly, it is for the legislative branch of the

state governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for Congress to determine what measures a State may properly adopt as appropriate or needful for the protection of the public morals, the public health, or the public safety; but notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.

Prior to 1888 the statutes of Iowa permitted the sale of foreign liquors imported under the laws of the United States, provided the sale was by the importer in the original casks or packages, and in quantities not less than those in which they were required to be imported; and the provisions of the statute to this effect were declared by the Supreme Court of Iowa, in Pearson v. International Distillery, 72 Iowa, 348, 354, to be "intended to conform the statute to the doctrine of the United States Supreme Court, announced in Brown v. Maryland, 12 Wheat., 419, and License Cases, 5 How., 504, so that the statute should not conflict with the laws and authority of the United States." But that provision of the statute was repealed in 1888, and the law so far amended that we understand it now to provide that, whether imported or not, wine cannot be sold in Iowa except for sacramental purposes, nor alcohol, except for specified chemical purposes, nor intoxicating liquors, including ale and beer, except for pharmaceutical and medicinal purposes, and not at all except by citizens of the State of Iowa, who are registered pharmacists, and have permits obtained as prescribed by the statute, a permit being also grantable to one discreet person in any township where a pharmacist does not obtain it.

The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in Bowman v. Chicago &c. Railway Co., supra, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to

interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the state legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create. Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson, in Gibbons v. Ogden, 9 Wheat., 1, 238, in "a frank and candid co-operation for the general good."

The legislation in question is to the extent indicated repugnant to the third clause of section 8 of Art. 1 of the Constitution of the United States, and therefore the judgment of the Supreme Court of Iowa is

Reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Gray, with whom concurred Mr. Justice Harlan and Mr. Justice Brewer, dissenting. . . .

Note.—The application of this case was restricted and its doctrine greatly modified by the decision of the court in Plumley v. Massachusetts, 155 U. S., 461 (1894).

MINNESOTA v. BARBER.

136 U. S., 313. Decided 1890.

[The facts are sufficiently stated in the opinion of the court.]

MR. JUSTICE HARLAN delivered the opinion of the court.

Henry E. Barber, the appellee, was convicted before a justice of the peace in Ramsey County, Minnesota, of the offense of having wrongfully and unlawfully offered and exposed for sale, and of having sold for human food, one hundred pounds of fresh uncured beef, part of an animal slaughtered in the State of Illinois, but which had not been inspected in Minnesota, and "certified" before slaughter by an inspector appointed under the laws of the latter State. Having been committed to the common jail of the county pursuant to a judgment of imprisonment for a term of thirty days, he sued out a writ of habeas corpus from the Circuit Court of the United States for the District of Minnesota, and prayed to be discharged from such imprisonment, upon the ground that the statute of that State, approved April 16, 1889, and under which he was prosecuted, was repugnant to the provision of the Constitution giving Congress power to regulate commerce among the several States, as well as to the provision declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Art. 1, Sec. 8. Art. 4, Sec. 2. The court below, speaking by Judge Nelson, held the statute to be in violation of both of these provisions, and discharged the prisoner from custody. In re Barber, 39 Fed. Rep., 641. A similar conclusion in reference to the same statute had been previously reached by Judge Blodgett, holding the Circuit Court of the United States for the Northern District of Illinois. Swift v. Sutphin, 39 Fed. Rep., 630.

From the judgment discharging Barber the State has prosecuted the present appeal. Rev. Stat., § 764; 23 Stat., 437, c. 353.

Attorneys representing persons interested in maintaining the validity of a statute of Indiana, alleged to be similar to that of Minnesota, were allowed to participate in the argument in this court, and to file briefs.

The statute of Minnesota upon the validity of which the decision of the case depends is as follows: Laws of 1889, c. 8, p. 51. . . . [Here follows the full text of the act, which is entitled "An act for the protection of the public health by providing for inspection, before slaughter, of cattle, sheep and swine de-

signed for slaughter for human food." It required that animals thus described should be inspected by State officers within twenty-four hours before they are slaughtered. If found fit for slaughter, certificates to that effect should be given; if not found fit, they should be removed and destroyed.]

The presumption that this statute was enacted, in good faith, for the purpose expressed in the title,—namely, to protect the health of the people of Minnesota,—cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this court. In Henderson &c. v. New York &c., 92 U. S., 259, 268, where a statute of New York imposing burdensome and almost impossible conditions on the landing of passengers from vessels employed in foreign commerce, was held to be unconstitutional and void as a regulation of such commerce, the court said that "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." In People v. Compagnie Générale Transatlantique, 107 U. S., 59, 63, where the question was as to the validity of a statute of the same State, which was attempted to be supported as an inspection law authorized by section 10 of article 1 of the Constitution, and was so designated in its title, it was said: "A State cannot make a law designed to raise money to support paupers, to detect or prevent crimes, to guard against disease and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title." So, in Soon Hing v. Crowley, 113 U. S., 703, 710: "The rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments." In Mugler v. Kansas, 123 U. S., 623, 661, the court, after observing that every possible presumption is to be indulged in favor of

the validity of a statute, said that the judiciary must obey the Constitution rather than the lawmaking department of the government, and must, upon its own responsibility, determine whether, in any particular case, the limits of the Constitution have been passed. It was added: "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States.

Underlying the entire argument in behalf of the State is the proposition that it is impossible to tell, by an inspection of fresh beef, veal, mutton, lamb, or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered; that inspection on the hoof, within a very short time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty. And it is insisted, with great confidence, that of this fact the court must take judicial notice. If a fact, alleged to exist, and upon which the rights of parties depend is within common experience and knowledge, it is one of which the courts will take judicial notice. Brown v. Piper, 91 U. S., 37, 42; Phillips v. Detroit, 111 U. S., 604, 606. But we cannot assent to the suggestion that the fact alleged in this case to exist is of that class. It may be the opinion of some that the presence of disease in animals at the time of their being slaughtered, cannot be determined by inspection of the meat taken from them; but we are not aware that such is the view universally, or even generally, entertained. But if, as alleged, the inspection of fresh beef, veal, mutton, lamb, or pork will not necessarily show whether the animal from which it was taken was diseased when slaughtered, it would not follow that a statute like the one before us is within the constitutional power of the State to enact. On the contrary, the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human

food, and entirely free from disease. A careful examination of the Minnesota act will place this construction of it beyond question.

The first section prohibits the sale of any fresh beef, veal, mutton, lamb, or pork for human food, except as provided in that act. The second and third sections provide that all cattle, sheep, and swine to be slaughtered for human food within the respective jurisdictions of the inspectors, shall be inspected by the proper local inspector appointed in Minnesota, within twenty-four hours before the animals are slaughtered, and that a certificate shall be made by such inspector, showing (if such be the fact) that the animals, when slaughtered, were found healthy and in suitable condition to be slaughtered for human food. The fourth section makes it a misdemeanor, punishable by fine or imprisonment, for any one to sell, expose, or offer for sale, for human food, in the State, any fresh beef, veal, mutton, lamb, or pork, not taken from an animal inspected and "certified before slaughter, by the proper local inspector" appointed under that act. As the inspection must take place within twenty-four hours immediately before the slaughtering, the act, by its necessary operation, excludes from the Minnesota market, practically, all fresh beef, veal, mutton, lamb, or pork—in whatever form, and although entirely sound, healthy, and fit for human food—taken from animals slaughtered in other States; and directly tends to restrict the slaughtering of animals, whose meat is to be sold in Minnesota for human food, to those engaged in such business in that State. This must be so, because the time, expense, and labor of sending animals from points outside of Minnesota to points in that State to be there inspected, and bringing them back, after inspection, to be slaughtered at the place from which they were sent—the slaughtering to take place within twenty-four hours after inspection, else the certificate of inspection becomes of no value—will be so great as to amount to an absolute prohibition upon sales, in Minnesota, of meats from animals not slaughtered within its limits. When to this is added the fact that the statute, by its necessary operation, prohibits the sale, in the State, of fresh beef, veal, mutton, lamb, or pork, from animals that may have been inspected carefully and thoroughly in the State where they were slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several States. It will not do to say—certainly no judicial tribunal can, with propriety, assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals there slaughtered for purposes of human food. If the object of the statute had

been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb, or pork, from animals slaughtered outside of that State, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, that object is attained by the act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result. . . .

The latest case in this court upon the subject of interstate commerce, as affected by local enactments discriminating against the products and citizens of other States, is Walling v. Michigan, 116 U. S., 446, 455. We there held to be unconstitutional a statute of Michigan, imposing a license tax upon persons, not residing or having their principal place of business in that State, but whose business was that of selling or soliciting the sale of intoxicating liquors to be shipped into the State from places without, a similar tax not being imposed in respect to the sale and soliciting for sale of liquors manufactured in Michigan. Mr. Justice Bradley, delivering the opinion of the court, said: "A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first-mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

It is, however, contended, in behalf of the State, that there is, in fact, no interference, by this statute, with the bringing of cattle, sheep, and swine into Minnesota from other States, nor any discrimination against the products of business of other States, for the reason—such is the argument—that the statute requiring an inspection of animals on the hoof, as a condition of the privilege of selling, or offering for sale, in the State, the meats taken from them, is applicable alike to all owners of such animals, whether citizens of Minnesota or citizens of other States. To this we answer, that a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by a State

upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute. Robbins v. Shelby Taxing District, 120 U. S., 489, 497; Case of the State Freight Tax, 15 Wall., 232. The people of Minnesota have as much right to protection against the enactments of that State, interfering with the freedom of commerce among the States, as have the people of other States. Although this statute is not avowedly, or in terms, directed against the bringing into Minnesota of the products of other States, its necessary effect is to burden or obstruct commerce with other States, as involved in the transportation into that State, for purposes of sale there, of all fresh beef, veal, mutton, lamb, or pork, however free from disease may have been the animals from which it was taken.

The learned counsel for the State relies with confidence upon Patterson v. Kentucky, 97 U. S., 501, as supporting the principles for which he contends. . . . [This decision upheld as a proper exercise of the police power a Kentucky statute forbidding the sale in that State of illuminating oils that would ignite below a certain temperature.] Now, the counsel of the State asks: If the State may, by the exercise of its police power, determine for itself what test shall be made of the safety of illuminating oils, and prohibit the sale of all oils not subjected to and sustaining such test, although such oils are manufactured by a process patented under the Constitution and laws of the United States, why may it not determine for itself what test shall be made of the wholesomeness and safety of food and prohibit the sale of all such food not submitted to and sustaining the test, although it may chance that articles otherwise subject to the Constitution and laws of the United States cannot sustain the test? The analogy, the learned counsel observes, seems close. But it is only seemingly close. There is no real analogy between that case and the one before us. The Kentucky statute prescribed no test of inspection which, in view of the nature of the property, was either unusual or unreasonable, or which by its necessary operation discriminated against any particular oil because of the locality of its production. If it had prescribed a mode of inspection to which citizens of other States, having oils designed for illuminating purposes and which they desired to sell in the Kentucky market, could not have reasonably conformed, it would undoubtedly have been held to be an unauthorized burden upon interstate commerce. Looking at the nature of the property to which the Kentucky statute had reference, there was no difficulty in the way of the patentee of the

particular oil there in question submitting to the required local inspection.

But a law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the State, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the State of sound meats, the product of animals slaughtered in other States. It is one thing for a State to exclude from its limits cattle, sheep, or swine, actually diseased, or meats that, by reason of their condition, or the condition of the animals from which they are taken, are unfit for human food, and punish all sales of such animals or of such meats within its limits. It is quite a different thing for a State to declare, as does Minnesota by the necessary operation of its statute, that fresh beef, veal, mutton, lamb, or pork—articles that are used in every part of this country to support human life—shall not be sold at all for human food within its limits, unless the animal from which such meats are taken is inspected in that State, or, as is practically said, unless the animal is slaughtered in that State.

One other suggestion by the counsel for the State deserves to be examined. It is, that so far as this statute is concerned, the people of Minnesota can purchase in other States fresh beef, veal, mutton, lamb, and pork, and bring such meats into Minnesota for their own personal use. We do not perceive that this view strengthens the case for the State, for it ignores the right which people of other States have in commerce between those States and the State of Minnesota. And it ignores the right of the people of Minnesota to bring into that State, for purposes of sale, sound and healthy meat, wherever such meat may have come into existence. But there is a consideration arising out of the suggestion just alluded to which militates somewhat against the theory that the statute in question is a legitimate exertion of the police powers of the State for the protection of the public health. If every hotel-keeper, railroad or mining corporation, or contractor, in Minnesota, furnishing subsistence to large numbers of persons, and every private family in that State, that is so disposed, can, without violating this statute, bring into the State from other States and use for their own purposes, fresh beef, veal, mutton, lamb and pork, taken from animals slaughtered outside Minnesota which may not have been inspected at all, or not within twenty-four hours before being slaughtered, what becomes of the argument, pressed with so much earnestness, that the health of the people of that State

requires that they be protected against the use of meats from animals not inspected in Minnesota within the twenty-four hours before being slaughtered? If the statute, while permitting the sale of meats from animals slaughtered, inspected and "certified" in that State, had expressly forbidden the introduction from other States, and their sale in Minnesota, of all fresh meats, of every kind, without making any distinction between those that were from animals inspected on the hoof and those that were not so inspected, its unconstitutionality could not have been doubted. And yet it is so framed that this precise result is attained as to all sales in Minnesota, for human food, of meats from animals slaughtered in other States.

In the opinion of this court the statute in question, so far as its provisions require, as a condition of sales in Minnesota of fresh beef, veal, mutton, lamb or pork for human food, that the animals from which such meats are taken shall have been inspected in Minnesota before being slaughtered, is in violation of the Constitution of the United States and void.

The judgment discharging the appellee from custody is affirmed,

NOTE.—The decisions of the Supreme Court on the commerce clause of the Constitution have differed widely from time to time, and there is now a tendency to return to the principles laid down by Chief Justice Marshall in Gibbons v. Ogden. On this point Mr. Justice Bradley has said, "A great number and variety of cases involving the commercial power of Congress have been brought to the attention of this court during the past fifteen years, which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that in order to give full and fair effect to the different clauses of the Constitution the court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify to some degree certain dicta and decisions that have occasionally been made in the intervening period." Leloup v. Mobile, 127 U. S., 640, 648 (1888).

153 U. S. 391
38 Law Ed 758
14 Sup. Ct. R. 857

143 U. S. 517
36 Law. Ed. 247
12 Supreme Ct. Rep.

V. THE POLICE POWER.

MUNN v. ILLINOIS.

94 U. S., 113. Decided 1876.

ERROR to the Supreme Court of the State of Illinois. . . .

[The facts are sufficiently stated in the opinion of the court.]

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative powers of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant—

1. To that part of sect. 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States;"

2. To that part of sect. 9 of the same article, which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;" and

3. To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

169 U. S. 466
42 Lawyers Ed. 819
18 Sup Ct R. 418

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guarantee against any encroachments upon an acknowledged right of citizenship by the legislatures of the States.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private (Thorpe v. R. & V. Railroad Co.,

27 Vt., 143); but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non laedas.* From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How., 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread," 3 Stat., 587, sec. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 id., 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Con-

stitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Thus, as to ferries, Lord Hale says, in his treatise De Jure Maris, 1 Harg. Law Tracts, 6, the king has "a right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order and take but reasonable toll; for if he fail in these he is finable." So if one owns the soil and landing-places on both banks of a stream, he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose; and this because the common good requires that all public ways shall be under the control of the public authorities. This privilege or prerogative of the king, who in this connection only represents and gives another name to the body politic, is not primarily for his profit, but for the protection of the people and the promotion of the general welfare. . . .

[Here follows another passage from Lord Hale regarding wharves.]

This statement of the law by Lord Hale was cited with approbation and acted upon by Lord Kenyon at the beginning of the present century, in Bolt v. Stennett, 8 T. R., 606.

And the same has been held as to warehouses and warehousemen. In Aldnutt v. Inglis, 12 East, 527, decided in 1810, it

appeared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority, under the general warehousing act, to receive wines from importers before the duties upon the importation were paid; and the question was, whether they could charge arbitrary rates for such storage, or must be content with a reasonable compensation. . . . [Here follow several passages from the opinions in this case, in which it was held that the charges must be reasonable.]

In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court said, "there is no motive . . . for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this State, tavern-keepers are licensed; . . . and the County Court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects." Mobile v. Yuille, 3 Ala., N. S., 140.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit:—

"And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," &c. 3 W. & M., c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. New Jersey Nav. Co. v. Merchants' Bank, 6 How., 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore, and forms the largest part of interstate commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels, which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions The railways have found it impracticable to

own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the sea-shore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he . . . take but reasonable toll." Certainly, if any business can be clothed "with a public interest and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the general assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce," art. 13, sect. 7; and by sect. 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that

all railroad companies should permit connections to be made with their tracks, so that any public warehouse, &c., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased

his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstance. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses

by legislatures the people must resort to the polls, not to the courts.

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, viz., that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the State from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other.

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the State Tax on Railway Gross Receipts, 15 Wall., 293, that "it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress, in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done.

The remaining objection, to wit, that the statute in its present form is repugnant to sect. 9, art. 1, of the Constitution of the United States, because it gives preference to the ports of one State over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the

powers of Congress, and in no respect affects the States in the regulation of their domestic affairs.

We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment. In passing upon this case we have not been unmindful of the vast importance of the questions involved. This and cases of a kindred character were argued before us more than a year ago by most eminent counsel, and in a manner worthy of their well-earned reputations. We have kept the cases long under advisement, in order that their decision might be the result of our mature deliberations.

Judgment affirmed.

[Mr. Justice Field rendered a dissenting opinion, in which Mr. Justice Strong concurred.]

ESCANABA COMPANY v. CHICAGO.

107 U. S., 678. Decided 1882.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated in the opinion of the court. . . . .

Mr. Justice Field delivered the opinion of the court.

The Escanaba and Lake Michigan Transportation Company, a corporation created under the laws of Michigan, is the owner of three steam-vessels engaged in the carrying trade between ports and places in different states on Lake Michigan and the navigable waters connecting with it. The vessels are enrolled and licensed for the coasting trade, and are principally employed in carrying iron ore from the port of Escanaba, in Michigan, to the docks of the Union Iron and Steel Company on the south fork of the south branch of the Chicago River in the city of Chicago. In their course up the river and its south branch and fork to the docks they are required to pass through draws of several bridges constructed over the stream by the city of Chicago; and it is of obstructions caused by the closing of the draws, under an ordinance of the city, for a designated hour of the morning and evening during week-days, and by a limitation of the time to ten minutes, during which a draw may be left open for the passage of a vessel, and by some of the piers in the south branch and fork, and the bridges resting on them, that the corporation complains, and to enjoin the city from closing the draws for the morning

and evening hours designated, and enforcing the ten minutes' limitation, and to compel the removal of the objectionable piers and bridges, the present bill is filed.

The river and its branches are entirely within the State of Illinois, and all of it, and nearly all of both branches that is navigable, are within the limits of the city of Chicago. The river, from the junction of its two branches to the lake, is about three-fourths of a mile in length. The branches flow in opposite directions and meet at its head, nearly at right angles with it. Originally the width of the river and its branches seldom exceeded one hundred and fifty feet; of the branches and fork it was often less than one hundred feet; but it has been greatly enlarged by the city for the convenience of its commerce.

The city fronts on Lake Michigan, and the mouth of the Chicago River is near its center. The river and its branches divide the city into three sections; one lying north of the main river and east of its north branch, which may be called its northern division; one lying between the north and south branches, which may be called its western division; and one lying south of the main river and east of the south branch, which may be called its southern division. Along the river and its branches the city has grown up into magnificent proportions, having a population of six hundred thousand souls. Running back from them on both sides are avenues and streets lined with blocks of edifices, public and private, with stores and warehouses, and the immense variety of buildings suited for the residence and the business of this vast population. These avenues and streets are connected by a great number of bridges, over which there is a constant passage of foot-passengers and of vehicles of all kinds. A slight impediment to the movement causes the stoppage of a crowd of passengers and a long line of vehicles.

The main business of the city, where the principal stores, warehouses, offices, and public buildings are situated, is in the southern division of the city; and a large number of the persons who do business there reside in the northern or the western division, or in the suburbs.

While this is the condition of business in the city on the land, the river and its branches are crowded with vessels of all kinds; sailing craft and steamers, boats, barges, and tugs, moving backwards and forwards, and loading and unloading. Along the banks there are docks, warehouses, elevators, and all the appliances for shipping and reshipping goods. To these vessels the unrestricted navigation of the river and its branches is of the utmost impor-

tance; while to those who are compelled to cross the river and its branches the bridges are a necessity. The object of wise legislation is to give facilities to both, with the least obstruction to either. This the city of Chicago has endeavored to do.

The State of Illinois, within which, as already mentioned, the river and its branches lie, has vested in the authorities of the city jurisdiction over bridges within its limits, their construction, repair, and use, and empowered them to deepen, widen, and change the channel of the stream, and to make regulations in regard to the times at which the bridges shall be kept open for the passage of vessels.

Acting upon the power thus conferred, the authorities have endeavored to meet the wants of commerce with other States, and the necessities of the population of the city residing or doing business in different sections. For this purpose they have prescribed as follows: that "Between the hours of six and seven o'clock in the morning, and half-past five and half-past six o'clock in the evenings, Sundays excepted, it shall be unlawful to open any bridge within the city of Chicago;" and that "During the hours between seven o'clock in the morning and half-past five o'clock in the evening, it shall be unlawful to keep open any bridge within the city of Chicago for the purpose of permitting vessels or other crafts to pass through the same, for a longer period at any one time than ten minutes, at the expiration of which period it shall be the duty of the bridge-tender or other person in charge of the bridge to display the proper signal, and immediately close the same, and keep it closed for fully ten minutes for such persons, teams, or vehicles as may be waiting to pass over, if so much time shall be required; when the said bridge shall again be opened (if necessary for vessels to pass) for a like period, and so on alternately (if necessary) during the hours last aforesaid; and in every instance where any such bridge shall be open for the passage of any vessel, vessels, or other craft, and closed before the expiration of ten minutes from the time of opening, said bridge shall then, in every such case, remain closed for fully ten minutes, if necessary, in order to allow all persons, teams, and vehicles in waiting to pass over said bridge."

The first of these requirements was called for to accommodate clerks, apprentices, and laboring men seeking to cross the bridges, at the hours named, in going to and returning from their places of labor. Any unusual delay in the morning would derange their business for the day, and subject them to a corresponding loss of wages. At the hours specified there is three times—so the record

shows—the usual number of pedestrians going and returning that there is during other hours.

The limitation of ten minutes for the passage of the draws by vessels seems to have been eminently wise and proper for the protection of the interests of all parties. Ten minutes is ample time for any vessel to pass the draw of a bridge, and the allowance of more time would subject foot-passengers, teams, and other vehicles to great inconvenience and delays.

The complainant principally objects to this ten minutes' limitation, and to the assignment of the morning and evening hour to pedestrians and vehicles. It insists that the navigation of the river and its branches should not be thus delayed; and that the rights of commerce by vessels are paramount to the rights of commerce by any other way.

But in this view the complainant is in error. The rights of each class are to be enjoyed without invasion of the equal rights of others. Some concession must be made on every side for the convenience and the harmonious pursuit of different occupations. Independently of any constitutional restrictions, nothing would seem more just and reasonable, or better designed to meet the wants of the population of an immense city, consistently with the interests of commerce than the ten minutes rule and the assignment of the morning and evening hours which the city ordinance has prescribed.

The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the States or with foreign countries. The Daniel Ball, 10 Wall., 557. Such is the case with the Chicago River and its branches. The common-law test of the navigability of waters, that they are subject to the ebb and flow of the tide, grew out of the fact that in England there are no waters navigable in fact, or to any great extent, which are not also affected by the tide. That test has long since been discarded in this country. Vessels larger than any which existed in England, when that test was established, now navigate rivers and inland lakes for more than a thousand miles beyond the reach of any tide. That test only becomes important when considering the rights of riparian owners to the bed of the stream, as in some States it governs in that matter.

The Chicago River and its branches must, therefore, be deemed

navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation.

But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period, and approved in repeated cases, the most notable of which are Willson v. The Blackbird Creek Marsh Co., 2 Pet., 245, decided in 1829, and Gilman v. Philadelphia, 3 Wall., 713, decided in 1865. . . . [Here follow citations from these cases and from Pound v. Turck, 95 U. S., 459.]

The doctrine declared in these several decisions is in accordance with the more general doctrine now firmly established, that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exercised are national in their character, and admit and require uniformity of regulation affecting alike all the States. Upon such subjects only that authority can act which can speak for the whole country. Its non-action is therefore a declaration that they shall remain free

from all regulation. Welton v. State of Missouri, 91 U. S., 275; Henderson v. Mayor of New York, 92 Id., 259; County of Mobile v. Kimball, 102 Id., 691.

On the other hand, where the subjects on which the power may be exercised are local in their nature or operation, or constitute mere aids to commerce, the authority of the State may be exerted for their regulation and management until Congress interferes and supersedes it. As said in the case last cited: "The uniformity of commercial regulations which the grant to Congress was designed to secure against conflicting State provisions, was necessarily intended only for cases where such uniformity is practicable. Where, from the nature of the subject or the sphere of its operations, the case is local and limited, special regulations, adapted to the immediate locality, could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the State authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done in respect to them, but is rather to be deemed a declaration that for the time being and until it sees fit to act they may be regulated by State authority."

Bridges over navigable streams, which are entirely within the limits of a State, are of the latter class. The local authority can better appreciate their necessity, and can better direct the manner in which they shall be used and regulated than a government at a distance. It is therefore, a matter of good sense and practical wisdom to leave their control and management with the States, Congress having the power at all times to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce.

It is, however, contended here that Congress has interfered, and by its legislation expressed its opinion as to the navigation of Chicago River and its branches; that it has done so by acts recognizing the ordinance of 1787, and by appropriations for the improvement of the harbor of Chicago.

The ordinance of 1787 for the government of the territory of the United States northwest of the Ohio River, contained in its fourth article a clause declaring that, "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of

the United States and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor."

The ordinance was passed July 13, 1787, one year and nearly eight months before the Constitution took effect; and although it appears to have been treated afterwards as in force in the territory, except as modified by Congress, and by the Act of May 7, 1800, c. 41, creating the Territory of Indiana, and by the Act of Feb. 3, 1809, c. 13, creating the Territory of Illinois, the rights and privileges granted by the ordinance are expressly secured to the inhabitants of those Territories; and although the act of April 18, 1818, c. 67, enabling the people of Illinois Territory to form a constitution and State government, and the resolution of Congress of Dec. 3, 1818, declaring the admission of the State into the Union, refer to the principles of the ordinance according to which the constitution was to be formed, its provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is "on an equal footing with the original States in all respects whatever." 3 Stat., 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Blackbird Creek, and Pennsylvania over the Schuylkill River. Pollard's Lessee v. Hagan, 3 How., 212; Permoli v. First Municipality, Id., 589; Strader v. Graham, 10 Id., 82.

But aside from these considerations, we do not see that the clause of the ordinance upon which reliance is placed materially affects the question before us. That clause contains two provisions: one that the navigable waters leading into the Mississippi and the St. Lawrence shall be common highways to the inhabitants; and the other, that they shall be forever free to them without any tax, impost, or duty therefor. The navigation of the Illinois River is free, so far as we are informed, from any tax, impost, or duty, and its character as a common highway is not

affected by the fact that it is crossed by bridges. All highways, whether by land or water, are subject to such crossings as the public necessities and convenience may require, and their character as such is not changed, if the crossings are allowed under reasonable conditions, and not so as to needlessly obstruct the use of the highways. In the sense in which the terms are used by publicists and statesmen, free navigation is consistent with ferries and bridges across a river for the transit of persons and merchandise as the necessities and convenience of the community may require. In Palmer v. Commissioners of Cuyahoga County we have a case in point. There application was made to the Circuit Court of the United States in Ohio for an injunction to restrain the erection of a drawbridge over a river in that State on the ground that it would obstruct the navigation of the stream and injure the property of the plaintiff. The application was founded on the provision of the fourth article of the ordinance mentioned. The court, which was presided over by Mr. Justice McLean, then having a seat on this bench, refused the injunction, observing that "This provision does not prevent a State from improving the navigableness of these waters, by removing obstructions, or by dams and locks, so increasing the depth of the water as to extend the line of navigation. Nor does the ordinance prohibit the construction of any work on the river which the State may consider important to commercial intercourse. A dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass with little or no delay, and without charge. A temporary delay, such as passing a lock, could not be considered as an obstruction prohibited by the ordinance." And again: "A drawbridge across a navigable water is not an obstruction. As this would not be a work connected with the navigation of the river, no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be only momentary, to raise the draw; and as such a work may be very important in a general intercourse of a community, no doubt is entertained as to the power of the State to make the bridge." 3 McLean, 226. The same observations may be made of the subsequent legislation of Congress declaring that navigable rivers within the Territories of the United States shall be deemed public highways. Sect. 9 of the act of May 18, 1796, c. 29; sect. 6 of the act of March 26, 1804, c. 35.

As to the appropriations by Congress, no money has been expended on the improvement of the Chicago River above the first bridge from the lake, known as Rush Street Bridge. No bridge,

therefore, interferes with the navigation of any portion of the river which has been thus improved. But, if it were otherwise, it is not perceived how the improvement of the navigability of the stream can affect the ordinary means of crossing it by ferries and bridges. The free navigation of a stream does not require an abandonment of those means. To render the action of the State invalid in constructing or authorizing the construction of bridges over one of its navigable streams, the general government must directly interfere so as to supersede its authority and annul what it has done in the matter.

It appears from the testimony in the record that the money appropriated by Congress has been expended almost exclusively upon what is known as the outer harbor of Chicago, a part of the lake surrounded by breakwaters. The fact that formerly a light-house was erected where now Rush Street Bridge stands in no respect affects the question. A ferry was then used there; and before the construction of the bridge the site as a light-house was abandoned. The existing light-house is below all the bridges. The improvements on the river above the first bridge do not represent any expenditure of the government.

From any view of this case, we see no error in the action of the court below, and this decree must accordingly be

Affirmed.

NOTE.—A municipal ordinance prohibiting from washing and ironing in public laundries and wash-houses within defined territorial limits, from ten o'clock at night until six in the morning, is a purely police regulation, within the competency of a municipality possesed of ordinary powers. Barbier v. Connolly, 113 U. S., 27.

The Fourteenth Amendment of the Constitution does not impair the police power of a State. Ib.

The prohibition by the State of Kansas, in its Constitution and laws, of the manufacture and sale within the limits of the State of intoxicating liquors for general use there as a beverage, is fairly adapted to the end of protecting the community against the evils which result from excessive use of ardent spirits, and is not subject to the objection that, under the guise of police regulations, the State is aiming to deprive the citizen of his constitutional rights. Mugler v. Kansas, 123 U. S., 623.

See also The License Cases, 5 Howard, 504; The License Tax Cases, 5 Wallace, 462; Cooley v. Wardens, 12 Howard, 299; Leisy v. Hardin, 135 U. S., 100; Minnesota v. Barber, 136 U. S., 313; and The Slaughter House Cases, 16 Wallace, 36.

VI. GENERAL (IMPLIED) POWERS.

McCULLOCH v. THE STATE OF MARYLAND ET AL.

4 Wheaton, 316. Decided 1819.

[The statement of facts and the second part of the opinion, beginning on page 425 of Wheaton, are given above, page 32. The first part of the opinion is given below.]

MARSHALL, C. J., delivered the opinion of the court. . . .

The first question made in the cause is, has congress power to incorporate a bank?

It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first congress elected under the present constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely

understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert, that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance.

These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the constitution was, indeed, elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each State, by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the

measures of the people themselves, or become the measures of the State governments.

From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is per-

petually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect that it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any State, to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment, had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to

avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and ex-

pensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither

sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the States the whole residuum of power, would it have been asserted that the government of the Union was not sovereign with respect to those objects which were intrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitu-

tion, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on congress the power of making laws. That, without it, doubts might be entertained, whether congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a congress, which is to consist of a senate and house of representatives. Each house may determine the rule of its proceedings; and it is declared that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the President of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of congress. Could it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention, that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but only such as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical neces-

sity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary" by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to

leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility, as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the constitution—is prescribed, and no other can be required. Yet, he would be charged with insanity who should contend, that the legislature might not superadd to the oath directed by the constitution, such other oath of office as its wisdom might suggest.

So, with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." The several

powers of congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offenses is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used

in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the State of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:—

1. The clause is placed among the powers of congress, not among the limitations on those powers.

2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and after deep reflection, impress on the mind another, they would rather have disguised the grant of power, than its limitation. If then, their intention had

been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers, and all others," &c., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government, from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the pur-

pose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the 3d section of the 4th article of the constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States," is not more comprehensive, than the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, congress justifying the measure by its necessity, transcended, perhaps, its powers to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is

really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

After this declaration, it can scarcely be necessary to say, that the existence of state banks can have no possible influence on the question. No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to state banks, and congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches, and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:—

2. Whether the State of Maryland may, without violating the constitution, tax that branch? . . .

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. . . .

NOTE.—The most important discussions of the implied powers of Congress are those found in the legal tender cases. See Knox v. Lee, 12 Wallace, 457, and Juilliard v. Greenman, 110 U. S., 421. See also James Wilson's Considerations on the Power to Incorporate the Bank of North America, Works (Andrews' edition), I, 549-577. Although a discussion of the inherent or implied powers of the Confederation, its reasoning is applicable to the implied powers of the government under the Constitution.

Bryce says of Marshall's opinion in this case (American Commonwealth, 3d Ed., I, 379, note), "This is really a working-out of one of the points of Hamilton's famous argument in favor of the constitutionality of a United States bank: 'Every power vested in a government is in its nature sovereign, and includes by force of the term a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution.' Works (Lodge's Ed.), vol. iii, p. 181."

"It is unnecessary for me to point out . . . the great influence which that decision of the Supreme Court has exercised over the material and financial prosperity of this country. Had the decision been, that there existed in this government no power to create a national currency, or to provide for a national banking system, the disastrous effects upon the business prosperity of the people can hardly be imagined. Those who are old enough to have gone through the State bank and wildcat systems of paper money prevalent a few years since in this country, can bear feeling testimony to the value of a so-called national bank system." Miller, Lectures on the Constitution of the United States, 391.

VII. EXECUTIVE POWERS.

In Ex parte Garland, 4 Wallace, 333 (1866), the validity of an act of Congress requiring every person admitted to practice before a United States court to take an oath that he had never borne arms against the United States nor held office under any authority hostile to the United States was called in question. Mr. Justice Field said with reference to the nature of the pardoning power of the President,

"The Constitution provides that the President 'shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.'[1]

"The power thus conferred is unlimited, with the exception stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy imposed in him cannot be fettered by any legislative restrictions.

"Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

"There is only this limitation to its operation: it does not re-

[1] Article II, § 2.

store offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.[2]

"The pardon produced by the petition is a full pardon 'for all offenses by him committed, arising from participation, direct or implied, in the Rebellion,' and is subject to certain conditions which have been complied with. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offense of treason, committed by his participation in the Rebellion. So far as that offense is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offense, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offense notwithstanding the pardon. If such exclusion can be effected by the exaction of an expurgatory oath covering the offense, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency. From the petitioner, therefore, the oath required by the act of January 24th, 1865, could not be exacted, even if that act were not subject to any other objection than the one thus stated."

In re NEAGLE.

135 U. S., 1. Decided 1890.

Mr. Justice Miller, on behalf of the court, stated the case as follows:—

This was an appeal by Cunningham, sheriff of the county of San Joaquin, in the State of California, from a judgment of the Circuit Court of the United States for the Northern District of California, discharging David Neagle from the custody of said sheriff, who held him a prisoner on a charge of murder.

On the 16th day of August, 1889, there was presented to Judge Sawyer, the Circuit Judge of the United States for the Ninth Circuit, embracing the Northern District of California, a petition signed David Neagle, deputy United States marshal, by A. L. Farrish on his behalf. This petition represented that the said Farrish was a deputy marshal duly appointed for the Northern

[2] 4 Blackstone's Commentaries, 402; 6 Bacon's Abridgment, tit. Pardon; Hawkins, book 2, c. 37, §§ 34 and 54.

District of California by J. C. Franks, who was the marshal of that district. It further alleged that David Neagle was, at the time of the occurrences recited in the petition and at the time of filing it, a duly appointed and acting deputy United States marshal for the same district. It then proceeded to state that said Neagle was imprisoned, confined, and restrained of his liberty in the county jail in San Joaquin County, in the State of California, by Thomas Cunningham, sheriff of said county, upon a charge of murder, under a warrant of arrest, a copy of which was annexed to the petition. The warrant was as follows:—

"In the Justice's Court of Stockton Township.

"STATE OF CALIFORNIA, }
County of San Joaquin, } ss:

"The People of the State of California to any sheriff, constable, marshal, or policeman of said State or of the county of San Joaquin:

"Information on oath having been this day laid before me by Sarah A. Terry that the crime of murder, a felony, has been committed within said county of San Joaquin on the 14th day of August, A. D. 1889, in this, that one David S. Terry, a human being then and there being, was wilfully, unlawfully, feloniously, and with malice aforethought shot, killed, and murdered, and accusing Stephen J. Field and David Neagle thereof: You are therefore commanded forthwith to arrest the above-named Stephen J. Field[3] and David Neagle and bring them before me, at my office, in the city of Stockton, or, in case of my absence or inability to act, before the nearest and most accessible magistrate in the county.

"Dated at Stockton this 14th day of August, A. D. 1889.

"H. V. J. SWAIN,
"Justice of the Peace.

[3] The Governor of California, on learning that a warrant had been issued for the arrest of Mr. Justice Field, promptly wrote to the Attorney-General of the State, urging "the propriety of at once instructing the District Attorney of San Joaquin County to dismiss the unwarranted proceeding against him," as his arrest "would be a burning disgrace to the State unless disavowed." The Attorney-General as promptly responded by advising the District Attorney that there was "no evidence to implicate Justice Field in said shooting," and that "public justice demands that the charge against him be dismissed," which was accordingly done.

"The defendant, David Neagle, having been brought before me on this warrant, is committed for examination to the sheriff of San Joaquin County, California.

"Dated August 15, 1889. H. V. J. SWAIN,
"Justice of the Peace."

The petition then recited the circumstances of a rencontre between said Neagle and David S. Terry, in which the latter was instantly killed by two shots from a revolver in the hands of the former. The circumstances of this encounter and of what led to it will be considered with more particularity hereafter. The main allegation of this petition was that Neagle, as United States deputy marshal, acting under the orders of Marshal Franks, and in pursuance of instructions from the Attorney-General of the United States, had, in consequence of an anticipated attempt at violence on the part of Terry against the Honorable Stephen J. Field, a justice of the Supreme Court of the United States, been in attendance upon said justice, and was sitting by his side at a breakfast table when a murderous assault was made by Terry on Judge Field, and in defense of the life of the judge the homicide was committed for which Neagle was held by Cunningham. The allegation was very distinct that Justice Field was engaged in the discharge of his duties as circuit justice of the United States for that circuit, having held court at Los Angeles, one of the places at which the court is by law held, and, having left that court, was on his way to San Francisco for the purpose of holding the Circuit Court at that place. The allegation was also very full that Neagle was directed by Marshal Franks to accompany him for the purpose of protecting him, and that these orders of Franks were given in anticipation of the assault which actually occurred. It was also stated, in more general terms, that Marshal Neagle, in killing Terry under the circumstances, was in the discharge of his duty as an officer of the United States, and was not, therefore, guilty of a murder, and that his imprisonment under the warrant held by Sheriff Cunningham was in violation of the laws and Constitution of the United States, and that he was in custody for an act done in pursuance of the laws of the United States. This petition being sworn to by Farrish, and presented to Judge Sawyer, he made the following order:

"Let a writ of habeas corpus issue in pursuance of the prayer of the within petition, returnable before the United States Circuit Court for the Northern District of California.

"SAWYER, Circuit Judge."

The writ was accordingly issued and delivered to Cunningham, who made the following return:—

"County of San Joaquin, State of California,
"Sheriff's Office.

"To the honorable Circuit Court of the United States for the Northern District of California:

"I hereby certify and return that before the coming to me of the annexed writ of habeas corpus the said David Neagle was committed to my custody, and is detained by me by virtue of a warrant issued out of the justice's court of Stockton township, State of California, county of San Joaquin, and by the indorsement made upon said warrant. Copy of said warrant and indorsement is annexed hereto and made a part of this return. Nevertheless, I have the body of the said David Neagle before the honorable court, as I am in the said writ commanded.

"August 17, 1889. Thomas Cunningham,
"Sheriff San Joaquin County, California."

Various pleadings and amended pleadings were made which do not tend much to the elucidation of the matter before us. Cunningham filed a demurrer to the petition for the writ of habeas corpus, and Neagle filed a traverse to the return of the sheriff, which was accompanied by exhibits, the substance of which will be hereafter considered when the case comes to be examined upon its facts.

The hearing in the Circuit Court was had before Circuit Judge Sawyer and District Judge Sabin. The sheriff, Cunningham, was represented by G. A. Johnson, Attorney-General of the State of California, and other counsel. A large body of testimony, documentary and otherwise, was submitted to the court, on which, after a full consideration of the subject, the court made the following order:

"In the Matter of David Neagle, on habeas corpus.

"In the above-entitled matter, the court having heard the testimony introduced on behalf of the petitioner, none having been offered for the respondent, and also the arguments of the counsel for petitioner and respondent, and it appearing to the court that the allegations of the petitioner in his amended answer or traverse to the return of the sheriff of San Joaquin County, respondent herein, are true, and that the prisoner is in custody for an act done in pursuance of a law of the United States, and in custody

in violation of the Constitution and laws of the United States, it is therefore ordered that petitioner be, and he is hereby, discharged from custody."

From that order an appeal was allowed which brought the case to this court, acompanied by a voluminous record of all the matters which were before the court on the hearing. . . .

MR. JUSTICE MILLER, after stating the case as above, delivered the opinion of the court.

If it be true, as stated in the order of the court discharging the prisoner, that he was held "in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States," there does not seem to be any doubt that, under the statute on that subject, he was properly discharged by the Circuit Court. . . .

[Here follows a history of the events leading up to the death of Terry.]

These are the material circumstances produced in evidence before the Circuit Court on the hearing of this habeas corpus case. It is but a short sketch of a history which is given in over five hundred pages in the record, but we think it is sufficient to enable us to apply the law of the case to the question before us. Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field. And we are quite sure that if Neagle had been merely a brother or a friend of Judge Field, traveling with him, and aware of all the previous relations of Terry to the judge,—as he was,—of his bitter animosity, his declared purpose to have revenge even to the point of killing him, he would have been justified in what he did in defense of Mr. Justice Field's life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the State of California, and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the State authorities for this offense, unless there be found in aid of the defense of the prisoner some element of power and authority asserted under the government of the United States.

This element is said to be found in the facts that Mr. Justice Field, when attacked, was in the immediate discharge of his duty as judge of the Circuit Courts of the United States within California; that the assault upon him grew out of the animosity of Terry and wife, arising out of the previous discharge of his duty

as circuit justice in the case for which they were committed for contempt of court; and that the deputy marshal of the United States, who killed Terry in defense of Field's life, was charged with a duty under the law of the United States to protect Field from the violence which Terry was inflicting, and which was intended to lead to Field's death.

To the inquiry whether this proposition is sustained by law and the facts which we have recited, we now address ourselves. . . .

We have no doubt that Mr. Justice Field when attacked by Terry was engaged in the discharge of his duties as Circuit Justice of the Ninth Circuit, and was entitled to all the protection under those circumstances which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties, and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of habeas corpus must in this connection show that he is "in custody for an act done or omitted in pursuance of a law of the United Sates," makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an act of Congress. It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a body-guard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of habeas corpus to persons imprisoned for the performance of their duty. And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision, that he must be in custody "for an act done or omitted in pursuance of a law of the United States or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States."

In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instru-

ment, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably.

It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means, than by the skill which is applied to the cure of disease after it has become fully developed. So also the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed.

If a person in the situation of Judge Field could have no other guarantee of his personal safety, while engaged in the conscientious discharge of a disagreeable duty, than the fact that if he was murdered his murderer would be subject to the laws of a State and by those laws could be punished, the security would be very insufficient. The plan which Terry and wife had in mind of insulting him and assaulting him and drawing him into a defensive physical contest, in the course of which they would slay him, shows the little value of such remedies. We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenseless and unprotected. . . . [Here are given citations from ex parte Siebold, 100 U. S., 371, 394, and from Tennessee v. Davis, 100 U. S., 257, 262.]

Where, then, are we to look for the protection which we have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States; because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of

the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure. They are subjected by act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. The same may be said of the district attorneys of the United States, who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four to five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While

in Smyrna he was seized by command of the Austrian consul-general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop-of-war, St. Louis, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hülsemann, the Austrian minister at Washington, which arose out of this affair and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. Upon what act of Congress then existing can any one lay his finger in support of the action of our government in this matter?

So, if the President or the Postmaster-General is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed and the mail carriers assaulted and murdered in any particular region of country, who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a posse comitatus properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

The United States is the owner of millions of acres of valuable public land, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when

cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of Wells v. Nickles, 104 U. S., 444. That was a case in which a class of men appointed by local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the government thus to seize the timber cut by trespassers on its lands. The court said: "The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful." But the court, notwithstanding there was no special statute for it, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the Land Office had, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands.

One of the cases in this court in which this question was presented in the most imposing form is that of United States v. San Jacinto Tin Company, 125 U. S., 273, 279, 280. In this case, a suit was brought in the name of the United States, by order of the Attorney General, to set aside a patent which had been issued for a large body of valuable land, on the ground that it was obtained from the government by fraud and deceit practiced upon its officers. A preliminary question was raised by counsel for the defendant, which was earnestly insisted upon, as to the right of the Attorney General or any other officer of the government to institute such a suit in the absence of any act of Congress authorizing it. It was conceded that there was no express authority given to the Attorney General to institute that particular suit or any suit of that class. The question was one of very great interest, and was very ably argued both in the court below and in this court. The response of this court to that suggestion conceded that in the acts of Congress establishing the Department of Justice and defining the duties of the Attorney General there was

no such express authority, and it was said that there was also no express authority to him to bring suits against debtors of the government upon bonds, or to begin criminal prosecutions, or to institute criminal proceedings in any of the cases in which the United States was plaintiff, yet he was invested with the general superintendence of all such suits. It was further said: "If the United States, in any particular case, has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself of frauds, impostures, and deceptions, than the private individual is hardly open to argument. . . . There must, then, be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the Attorney-General. How, then, can it be argued that if the United States has been deceived, entrapped, or defrauded, into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it cannot bring a suit to avoid the effect of such instrument, thus fraudulently obtained, without a special act of Congress in each case, or without some special authority applicable to this class of cases?" The same question was raised in the earlier case of United States v. Hughes, 11 How., 552, and decided the same way.

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. The correspondence already recited in this opinion between the marshal of the Northern District of California, and the Attorney-General, and the district attorney of the United States for that district, although prescribing no very specific mode of affording this protection by the Attorney-General, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in

making the provision which he did make, for the protection and defense of Mr. Justice Field.

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. In chapter fourteen of the Revised Statutes of the United States, which is devoted to the appointment and duties of the district attorneys, marshals, and clerks of the courts of the United States, section 788 declares:

"The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof."

If therefore, a sheriff of the State of California was authorized to do in regard to the laws of California what Neagle did, that is, if he is authorized to keep the peace, to protect a judge from assault and murder, then Neagle was authorized to do the same thing in reference to the laws of the United States. . . .

That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing this duty, it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed, the assailant and violater of the law and disturber of the peace, or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry's death. This duty was imposed on him by the section of the Revised Statutes which we have cited, in connection with the powers conferred by the State of California upon its peace

officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States. . . .

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the sheriff of San Joaquin County.

[Mr. Justice Lamar delivered a dissenting opinion in which Chief Justice Fuller concurred.]

Note.—The recent case of Parsons v. United States, 167 U. S., 324, (1897), discusses the President's power of removal, but does not determine the constitutional question involved. The opinion is valuable for its statement of the legislative, executive, and judicial history of the question.

VIII. WAR.—MARTIAL LAW.

MARTIN v. MOTT.

12 Wheaton, 19. Decided 1827.

The case is stated in the opinion of the court. . . .

STORY, J., delivered the opinion of the court.

This is a writ of error to the judgment of the court for the trial of impeachments and the correction of errors of the State of New York, being the highest court of that State, and is brought here in virtue of the 25th section of the Judiciary Act of 1789,[1] c. 20. The original action was a replevin for certain goods and chattels, to which the original defendant put in an avowry, and to that avowry there was a demurrer, assigning nineteen distinct and special causes of demurrer. Upon a joinder in demurrer, the supreme court of the State gave judgment against the avowant; and that judgment was affirmed by the high court to which the present writ of error is addressed.

The avowry, in substance, asserts a justification of the taking of the goods and chattels to satisfy a fine and forfeiture imposed upon the original plaintiff by a court-martial, for a failure to enter the service of the United States as a militiaman, when thereto required by the President of the United States, in pursuance of the act of the 28th of February, 1795. It is argued that this avowry is defective, both in substance and form; and it will be our business to discuss the most material of these objections; and as to others, of which no particular notice is taken, it is to be understood that the court are of opinion that they are either unfounded in fact or in law, and do not require any separate examination.

For the more clear and exact consideration of this subject, it may be necessary to refer to the constitution of the United States, and some of the provisions of the act of 1795. The constitution declares that congress shall have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions;" and also "to provide for organ-

[1] 1 Stats. at Large, 85.

izing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." In pursuance of this authority, the act of 1795 has provided, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." And like provisions are made for the other cases stated in the constitution. It has not been denied here that the act of 1795 is within the constitutional authority of congress, or that congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

The power thus confided by congress to the President, is, doubtless of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circum-

stances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If "the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defense, and of watching over the internal peace of the confederacy,"[1] these powers must be so construed as to the modes of their exercise as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defense must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best-disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself is strongly fortified. The words are, "whenever the United States shall be invaded, or be in imminent danger of invasion, &c., it shall be lawful for the President, &c., to call forth such number of the militia, &c., as he may judge necessary to repel such invasion." The power itself is confided to the Executive of the Union, to him who is, by the constitution, "the commander-in-chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed,"

[1] The Federalist, No. 29.

and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny. . . . [Here follows a reference to the New York case of Vanderheyden v. Young, 11 Johns. Rep., 150.]

But it is now contended, as it was contended in that case, that notwithstanding the judgment of the President is conclusive as to the existence of the exigency, and may be given in evidence as conclusive proof thereof, yet that the avowry is fatally defective, because it omits to aver that the fact did exist. The argument is that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power intrusted to the Executive of the nation for great

political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the court, that this objection can not be maintained. When the President exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and a fortiori, this presumption ought to be favorably applied to the chief magistrate of the Union. It is not necessary to aver, that the act which he may rightfully do, was so done. If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury. This view of the objection is precisely the same which was acted upon by the supreme court of New York, in the case already referred to, and, in the opinion of this court, with entire legal correctness. . . .

Upon the whole, it is the opinion of the court that the judgment of the court for the trial of impeachments and the correction of errors ought to be reversed; and that the cause be remanded to the same court, with directions to cause a judgment to be entered upon the pleadings in favor of the avowant.

THE PRIZE CASES.

THE BRIG AMY WARWICK. THE SCHOONER CRENSHAW. THE SCHOONER BRILLIANTE. THE BARK HIAWATHA.

2 Black, 635. Decided 1863.

[The facts are sufficiently stated in the opinion of the court.]

Mr. Justice Grier. There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each.

They are, 1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against

the government, on the principles of international law, as known and acknowledged among civilized States?

2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies' property"?

I. Neutrals have a right to challenge the existence of a blockade de facto, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade de facto actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the Government and Commander-in-Chief of the Army and Navy, was the proper person to make such notification, has not been, and cannot be disputed.

The right of prize and capture has its origin in the *jus belli*, and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist de facto, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us inquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents,—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have

declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

"This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, &c., &c.; the war will become cruel, horrible, and every day more destructive to the nation."

As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and know.

The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land."

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Consti-

tution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "unilateral." Lord Stowell (1 Dodson, 247) observes, "It is not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress of May 13, 1846, which recognized "a state of war as existing by the act of the Republic of Mexico." This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress.

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be

acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the Santissima Trinidad (7 Wheaton, 337), this court say: "The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war." (See also 3 Binn., 252.)

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the Government of the United States of America and certain States styling themselves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the Government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies because they are traitors; and a war levied on the government by traitors, in order to dismember and destroy it, is not a war because it is an "insurrection."

Whether the President, in fulfilling his duties as Commander-in-chief in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be gov-

erned by the decisions and acts of the political department of the Government to which this power was intrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the Secretary of State admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress "*ex majore cautela*" and in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been issued and done under the previous express authority and direction of the Congress of the United States."

Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, "*omnis ratihabitio retrotrahitur et mandato equiparatur*," this ratification has operated to perfectly cure the defect. In the case of Brown vs. United States (8 Cr., 131, 132, 133), Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"

Although Mr. Justice Story dissented from the majority of the Court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is ex post facto, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal Court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question therefore we are of the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard.

II. We come now to the consideration of the second question. What is included in the term "enemies' property"?

Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as "enemies' property" whether the owner be in arms against the Government or not?

The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war. Money and wealth, the products of agriculture and commerce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence it is, that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy, by capturing his property on the high seas.

The appellants contend that the term "enemy" is properly applicable to those only who are subjects or citizens of a foreign State at war with our own. They quote from the pages of the common law, which say, "that persons who wage war against the King may be of two kinds, subjects or citizens. The former are not proper enemies, but rebels and traitors; the latter are those that come properly under the name of enemies."

They insist, moreover, that the President himself, in his proclamation, admits that great numbers of the persons residing within the territories in possession of the insurgent government are loyal in their feelings, and forced by compulsion and the violence of the rebellious and revolutionary party and its "de facto government" to submit to their laws and assist in their scheme of revolution; that the acts of the usurping government cannot legally sever the bond of their allegiance; they have, therefore, a co-relative right to claim the protection of the government for their persons and property, and to be treated as loyal citizens, till legally convicted of having renounced their allegiance and made war against the Government by treasonably resisting its laws.

They contend, also, that insurrection is the act of individuals and not of a government or sovereignty; that the individuals engaged are subjects of law. That confiscation of their property can be effected only under a municipal law. That by the law of the land such confiscation cannot take place without the conviction of the owner of some offense, and finally that the secession

ordinances are nullities and ineffectual to release any citizen from his allegiance to the national Government, and consequently that the Constitution and laws of the United States are still operative over persons in all the States for punishment as well as protection.

This argument rests on the assumption of two propositions, each of which is without foundation on the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be sovereign cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battlefield or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is "unconstitutional!!!" Now, it is a proposition never doubted, that the belligerent party who claims to be sovereign may exercise both belligerent and sovereign rights, (see 4 Cr., 272). Treating the other party as a belligerent and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity. We have shown that a civil war such as that now waged between the Northern and Southern States is properly conducted according to the humane regulations of public law as regards capture on the ocean.

Under the very peculiar Constitution of this Government, although the citizens owe supreme allegiance to the Federal Government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws.

Hence, in organizing this rebellion, they have acted as States claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal Government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign state. Their right to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the General Government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force—south of this

line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power.

All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors.

But in defining the meaning of the term "enemies' property," we will be led into error if we refer to Fleta and Lord Coke for their definition of the word "enemy." It is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law.

Whether property be liable to capture as "enemies' property" does not in any manner depend on the personal allegiance of the owner. "It is the illegal traffic that stamps it as 'enemies' property.' It is of no consequence whether it belongs to an ally or a citizen. 8 Cr., 384. The owner, *pro hac vice*, is an enemy." 3 Wash. C. C. R., 183.

The produce of the soil of the hostile country, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicile of the owner, and much more so if he reside and trade within their territory.

III. We now proceed to notice the facts peculiar to the several cases submitted for our consideration. The principles which have just been stated apply alike to all of them. . . .

[Mr. Justice Nelson delivered a dissenting opinion, in which Chief Justice Taney and Justices Catron and Clifford concurred.]

Note.—The decision in the Prize Cases was important not only for the legal points determined, but for the complications that would have ensued had the decision been different. The gravity of the situation is set forth in the following letter of Richard H. Dana, Jr., who was one of the counsel for the Government. He said, "The Government is carrying on a war. It is exerting all the powers of war. Yet the claimants of the captured vessels not only seek to save their vessels by denying that they are liable to capture, but deny the right of the Government to exercise war powers,—deny that this can be, in point of law, a war. So the judiciary is actually, after a war of twenty-three months' duration, to decide whether the Government has the legal capacity to exert

these war powers. . . . Contemplate, my dear sir, the possibility of the Supreme Court deciding that this blockade is illegal! What a position it would put us in before the world, whose commerce we have been illegally prohibiting, whom we have unlawfully subjected to cotton famine, and domestic dangers and distress for two years! It would end the war, and where it would leave us with neutral powers, it is fearful to contemplate! Yet such an event is legally possible,—I do not think it probable, hardly possible, in fact. But last year I think there was danger of such a result when the blockade was new, and before the three new Judges were appointed." C. F. Adams, Life of Richard Henry Dana, II, 267. Quoted by Carson, The Supreme Court of the United States, 385.

That the fears expressed in this letter were not groundless appears from the fact that a majority of the court as it was constituted before the appointment of the new judges dissented from the judgment rendered in this case.

Ex parte MILLIGAN.

4 Wallace, 2. Decided 1866.

This case came before the court upon a certificate of division from the judges of the Circuit Court for Indiana, on a petition for discharge from unlawful imprisonment. . . . [The facts are sufficiently stated in the opinion of the court.]

Mr. Justice Davis delivered the opinion of the court.

On the 10th day of May, 1865, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of Indiana, to be discharged from an alleged unlawful imprisonment. The case made by the petition is this: Milligan is a citizen of the United States; has lived for twenty years in Indiana; and, at the time of the grievances complained of, was not, and never had been in the military or naval service of the United States. On the 5th day of October, 1864, while at home, he was arrested by order of General Alvin P. Hovey, commanding the military district of Indiana; and has ever since been kept in close confinement.

On the 21st day of October, 1864, he was brought before a

military commission, convened at Indianapolis, by order of General Hovey, tried on certain charges and specifications; found guilty, and sentenced to be hanged; and the sentence ordered to be executed on Friday, the 19th day of May, 1865.

On the 2d day of January, 1865, after the proceedings of the military commission were at an end, the Circuit Court of the United States for Indiana met at Indianapolis and empanelled a grand jury, who were charged to inquire whether the laws of the United States had been violated; and, if so, to make presentments. The court adjourned on the 27th day of January, having prior thereto discharged from further service the grand jury, who did not find any bill of indictment or make any presentment against Milligan for any offense whatever; and in fact, since his imprisonment, no bill of indictment has been found or presentment made against him by any grand jury of the United States.

Milligan insists that said military commission had no jurisdiction to try him upon the charges preferred, or upon any charges whatever; because he was a citizen of the United States and the State of Indiana, and had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

The prayer of the petition was, that under the act of Congress, approved March 3d, 1863, entitled, "An act relating to habeas corpus and regulating judicial proceedings in certain cases," he may be brought before the court, and either turned over to the proper civil tribunal to be proceeded against according to the law of the land or discharged from custody altogether.

With the petition were filed the order for the commission, the charges and specifications, the findings of the court, with the order of the War Department reciting that the sentence was approved by the President of the United States, and directing that it be carried into execution without delay. The petition was presented and filed in open court by the counsel for Milligan; at the same time the District Attorney of the United States for Indiana appeared, and, by the agreement of counsel, the application was submitted to the court. The opinions of the judges of the Circuit Court were opposed on three questions, which are certified to the Supreme Court:

1st. "On the facts stated in said petition and exhibits, ought a writ of habeas corpus to be issued?"

2d. "On the facts stated in said petition and exhibits, ought the

said Lambdin P. Milligan to be discharged from custody as in said petition prayed?"

3d. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said Milligan in manner and form as in said petition and exhibits is stated?"

The importance of the main question presented by this record cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty.

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation.

But we are met with a preliminary objection. It is insisted that the Circuit Court of Indiana had no authority to certify these questions; and that we are without jurisdiction to hear and determine them.

The sixth section of the "Act to amend the judicial system of the United States," approved April 29, 1802, declares "that whenever any question shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court at their next session to be held thereafter; and shall by the said court be finally decided: And the decision of the Supreme Court and their order in the premises shall be remitted to the Circuit Court and be there entered of record, and shall have effect according to the nature of the said judgment and order: Provided, That nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

It is under this provision of law that a Circuit Court has authority to certify any question to the Supreme Court for adjudication. The inquiry, therefore, is whether the case of Milligan is brought within its terms.

It was admitted at the bar that the Circuit Court had jurisdiction to entertain the application for the writ of habeas corpus and to hear and determine it; and it could not be denied; for the power is expressly given in the 14th section of the Judiciary Act of 1789, as well as in the later act of 1863. Chief Justice Marshall, in Bollman's case,[1] construed this branch of the Judiciary Act to authorize the courts as well as the judges to issue the writ for the purpose of inquiring into the cause of the commitment; and this construction has never been departed from. But it is maintained with earnestness and ability that a certificate of division of opinion can occur only in a cause; and that the proceeding by a party, moving for a writ of habeas corpus, does not become a cause until after the writ has been issued and a return made.

Independently of the provisions of the act of Congress of March 3, 1863, relating to habeas corpus, on which the petitioner bases his claim for relief, and which we will presently consider, can this position be sustained?

It is true that it is usual for a court on application for a writ of habeas corpus, to issue the writ, and on the return, to dispose of the case; but the court can elect to waive the issuing of the writ and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged. One of the very points on which the case of Tobias Watkins, reported in 3 Peters,[2] turned, was, whether, if the writ has issued, the petitioner would be remanded upon the case which he had made. The Chief Justice, in delivering the opinion of the court, said: "The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently the writ ought not to be awarded if the court is satisfied that the prisoner would be remanded to prison."

The judges of the Circuit Court of Indiana were, therefore, warranted by an express decision of this court in refusing the writ, if satisfied that the prisoner on his own showing was rightfully detained.

But it is contended, if they differed about the lawfulness of the imprisonment, and could render no judgment, the prisoner is remediless; and cannot have the disputed question certified under the act of 1802. His remedy is complete by writ of error or appeal, if the court renders a final judgment refusing to discharge him; but if he should be so unfortunate as to be placed in the

[1] 4 Cranch, 75. [2] Page 193.

predicament of having the court divided on the question whether he should live or die, he is hopeless and without remedy. He wishes the vital question settled, not by a single judge at his chambers, but by the highest tribunal known to the Constitution; and yet the privilege is denied him; because the Circuit Court consists of two judges instead of one.

Such a result was not in the contemplation of the legislature of 1802; and the language used by it cannot be construed to mean any such thing. The clause under consideration was introduced to further the ends of justice, by obtaining a speedy settlement of important questions where the judges might be opposed in opinion.

The act of 1802 so changed the judicial system that the Circuit Court, instead of three, was composed of two judges; and without this provision or a kindred one, if the judges differed, the difference would remain, the question be unsettled, and justice denied. The decisions of this court upon the provisions of this section have been numerous. In United States v. Daniel,[3] the court, in holding that a division of the judges on a motion for a new trial could not be certified, say: "That the question must be one which arises in a cause depending before the court relative to a proceeding belonging to the cause." Testing Milligan's case by this rule of law, is it not apparent that it is rightfully here; and that we are compelled to answer the questions on which the judges below were opposed in opinion? If, in the sense of the law, the proceeding for the writ of habeas corpus was the "cause" of the party applying for it, then it is evident that the "cause" was pending before the court, and that the questions certified arose out of it, belonged to it, and were matters of right and not of discretion.

But it is argued that the proceeding does not ripen into a cause, until there are two parties to it.

This we deny. It was the cause of Milligan when the petition was presented to the Circuit Court. It would have been the cause of both parties, if the court had issued the writ and brought those who held Milligan in custody before it. Webster defines the word "cause" thus: "A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right"—and he says, "this is a legal, scriptural, and popular use of the word coinciding nearly with case, from *cado*, and action, from *ago*, to urge and drive."

In any legal sense, action, suit, and cause, are convertible terms.

[3] 6 Wheaton, 542.

Milligan supposed he had a right to test the validity of his trial and sentence; and the proceeding which he set in operation for that purpose was his "cause" or "suit." It was the only one by which he could recover his liberty. He was powerless to do more; he could neither instruct the judges nor control their action, and should not suffer, because, without fault of his, they were unable to render a judgment. But the true meaning to the term "suit" has been given by this court. One of the questions in Weston v. City Council of Charleston[4] was whether a writ of prohibition was a suit; and Chief Justice Marshall says: "The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him." Certainly, Milligan pursued the only remedy which the law afforded him.

Again in Cohens v. Virginia,[5] he says: "In law language a suit is the prosecution of some demand in a court of justice." Also, "To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is to continue that demand." When Milligan demanded his release by the proceeding relating to habeas corpus, he commenced a suit; and he has since prosecuted it in all the ways known to the law. One of the questions in Holmes v. Jennison et al.,[6] was, whether under the 25th section of the Judiciary Act a proceeding for a writ of habeas corpus was a "suit." Chief Justice Taney held, that, "if a party is unlawfully imprisoned, the writ of habeas corpus is his appropriate legal remedy. It is his suit in court to recover his liberty." There was much diversity of opinion on another ground of jurisdiction; but that, in the sense of the 25th section of the Judiciary Act, the proceeding by habeas corpus was a suit, was not controverted by any except Baldwin, Justice, and he thought that "suit" and "cause" as used in the section, mean the same thing.

The court do not say that a return must be made and the parties appear and begin to try the case before it is a suit. When the petition is filed and the writ prayed for, it is a suit,—the suit of the party making the application. If it is a suit under the 25th section of the Judiciary Act when the proceedings are begun, it is, by all the analogies of the law, equally a suit under the 6th section of the act of 1802.

But it is argued, that there must be two parties to the suit, be-

[4] 2 Peters, 449.
[5] 6 Wheaton, 264.
[6] 14 Peters, 540.

cause the point is to be stated upon the request of "either party or their counsel."

Such a literal and technical construction would defeat the very purpose the legislature had in view, which was to enable any party to bring the case here, when the point in controversy was a matter of right and not of discretion; and the words "either party," in order to prevent a failure of justice, must be construed as words of enlargement, and not of restriction. Although this case is here ex parte, it was not considered by the court below without notice having been given to the party supposed to have an interest in the detention of the prisoner. The statements of the record show that this is not only a fair, but conclusive inference. When the counsel for Milligan presented to the court the petition for a writ of habeas corpus, Mr. Hanna, the District Attorney for Indiana, also appeared; and, by agreement, the application was submitted to the court, who took the case under advisement, and on the next day announced their inability to agree, and made the certificate. It is clear that Mr. Hanna did not represent the petitioner, and why is his appearance entered? It admits of no other solution than this,—that he was informed of the application, and appeared on behalf of the government to contest it. The government was the prosecutor of Milligan, who claimed that his imprisonment was illegal; and sought, in the only way he could, to recover his liberty. The case was a grave one; and the court, unquestionably, directed that the law officer of the government should be informed of it. He very properly appeared, and, as the facts were uncontroverted and the difficulty was in the application of the law, there was no useful purpose to be obtained in issuing the writ. The cause was, therefore, submitted to the court for their consideration and determination.

But Milligan claimed his discharge from custody by virtue of the act of Congress "relating to habeas corpus, and regulating judicial proceedings in certain cases," approved March 3, 1863. Did that act confer jurisdiction on the Circuit Court of Indiana to hear this case?

In interpreting a law, the motives which must have operated with the legislature in passing it are proper to be considered. This law was passed in a time of great national peril, when our heritage of free government was in danger. An armed rebellion against the national authority, of greater proportions than history affords an example of, was raging; and the public safety required that the privilege of the writ of habeas corpus should be suspended. The President had practically suspended it, and detained suspected

persons in custody without trial; but his authority to do this was questioned. It was claimed that Congress alone could exercise this power; and that the legislature, and not the President, should judge of the political considerations on which the right to suspend it rested. The privilege of this great writ had never before been withheld from the citizen; and as the exigence of the times demanded immediate action, it was of the highest importance that the lawfulness of the suspension should be fully established. It was under these circumstances, which were such as to arrest the attention of the country, that this law was passed. The President was authorized by it to suspend the privilege of the writ of habeas corpus, whenever, in his judgment, the public safety required; and he did, by proclamation, bearing date the 15th of September, 1863, reciting, among other things, the authority of this statute, suspend it. The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.

It is proper, therefore, to inquire under what circumstances the courts could rightfully refuse to grant this writ, and when the citizen was at liberty to invoke its aid.

The second and third sections of the law are explicit on these points. The language used is plain and direct, and the meaning of the Congress cannot be mistaken. The public safety demanded, if the President thought proper to arrest a suspected person, that he should not be required to give the cause of his detention on return to a writ of habeas corpus. But it was not contemplated that such person should be detained in custody beyond a certain fixed period, unless certain judicial proceedings, known to the common law, were commenced against him. The Secretaries of State and War were directed to furnish to the judges of the courts of the United States a list of the names of all parties, not prisoners of war, resident in their respective jurisdictions, who then were or afterwards should be held in custody by the authority of the President, and who were citizens of States in which the administration of the laws in the Federal tribunals was unimpaired. After the list was furnished, if a grand jury of the district convened and adjourned, and did not indict or present one of the persons thus named, he was entitled to his discharge; and it was the duty of the judge of the court to order him brought before him to be discharged, if he desired it. The refusal or omission to furnish the list could not operate to the injury of any one who was not indicted or presented by the grand jury; for, if twenty days had elapsed from the time of his arrest and the termination

of the session of the grand jury, he was equally entitled to his discharge as if the list were furnished; and any credible person, on petition verified by affidavit, could obtain the judge's order for that purpose.

Milligan, in his application to be released from imprisonment, averred the existence of every fact necessary under the terms of this law to give the Circuit Court of Indiana jurisdiction. If he was detained in custody by the order of the President, otherwise than as a prisoner of war; if he was a citizen of Indiana and had never been in the military or naval service, and the grand jury of the district had met, after he had been arrested, for a period of twenty days, and adjourned without taking any proceedings against him, then the court had the right to entertain his petition and determine the lawfulness of his imprisonment. Because the word "court" is not found in the body of the second section, it was argued at the bar, that the application should have been made to a judge of the court, and not to the court itself; but this is not so, for power is expressly conferred in the last proviso of the section on the court equally with a judge of it to discharge from imprisonment. It was the manifest design of Congress to secure a certain remedy by which any one, deprived of liberty, could obtain it, if there was a judicial failure to find cause of offense against him. Courts are not, always, in session, and can adjourn on the discharge of the grand jury; and before those who are in confinement could take proper steps to procure their liberation. To provide for this contingency, authority was given to the judges out of court to grant relief to any party who could show, that, under the law, he should be no longer restrained of his liberty.

It was insisted that Milligan's case was defective because it did not state that the list was furnished to the judges; and, therefore, it was impossible to say under which section of the act it was presented.

It is not easy to see how this omission could affect the question of jurisdiction. Milligan could not know that the list was furnished, unless the judges volunteered to tell him; for the law did not require that any record should be made of it or anybody but the judges informed of it. Why aver the fact when the truth of the matter was apparent to the court without an averment? How can Milligan be harmed by the absence of the averment, when he states that he was under arrest for more than sixty days before the court and grand jury, which should have considered his case, met at Indianapolis? It is apparent, therefore, that under the Habeas Corpus Act of 1863 the Circuit Court of Indiana had com-

plete jurisdiction to adjudicate upon this case, and, if the judges could not agree on questions vital to the progress of the cause, they had the authority (as we have shown in a previous part of this opinion), and it was their duty to certify those questions of disagreement to this court for final decision. It was argued that a final decision on the questions presented ought not to be made, because the parties who were directly concerned in the arrest and detention of Milligan, were not before the court; and their rights might be prejudiced by the answer which should be given to those questions. But this court cannot know what return will be made to the writ of habeas corpus when issued; and it is very clear that no one is concluded upon any question that may be raised to that return. In the sense of the law of 1802 which authorized a certificate of division, a final decision means final upon the points certified; final upon the court below, so that it is estopped from any adverse ruling in all the subsequent proceedings of the cause.

But it is said that this case is ended, as the presumption is, that Milligan was hanged in pursuance of the order of the President.

Although we have no judicial information on the subject, yet the inference is that he is alive; for otherwise learned counsel would not appear for him and urge this court to decide his case. It can never be in this country of written constitution and laws, with a judicial department to interpret them, that any chief magistrate would be so far forgetful of his duty, as to order the execution of a man who denied the jurisdiction that tried and convicted him; after his case was before Federal judges with power to decide it, who, being unable to agree on the grave questions involved, had, according to known law, sent it to the Supreme Court of the United States for decision. But even the suggestion is injurious to the Executive, and we dismiss it from further consideration. There is, therefore, nothing to hinder this court from an investigation of the merits of this controversy.

The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious States, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of

the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty, and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle, and secured in a written Constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, "That the trial of all crimes, except in case of impeachment, shall be by jury;" and in the fourth, fifth, and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure; and directs that a judicial warrant shall not issue "without proof of probable cause supported by oath or affirmation." The fifth declares "that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived of life, liberty, or property, without due process of law." And the sixth guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished. It is in these words: "In all

criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? and if so, what are they?

Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive

their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President, because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."

But it is said that the jurisdiction is complete under the "laws and usages of war."

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in States which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offenses charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a State, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offenses, and was

never interrupted in its administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," the law said, arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to the various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,"—language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, "excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;" and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.

The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common-law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of States

where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of State or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if, in his opinion, the exigencies of the country demand it, and of which he is the judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for, and to the exclusion of, the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of, and superior to, the civil power,"—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus.

It is essential to the safety of every government that in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit, in the exercise of a proper discretion, to make arrests, should not be required to produce the persons arrested in answer to a writ of habeas corpus. The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, asisted by an impartial jury, was the only sure way

of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on States in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal States should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and

it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one State, when, in another, it would be "mere lawless violence."

We are not without precedents in English and American history illustrating our views of this question; but it is hardly necessary to make particular reference to them.

From the first year of the reign of Edward the Third, when the Parliament of England reversed the attainder of the Earl of Lancaster, because he could have been tried by the courts of the realm, and declared, "that in time of peace no man ought to be adjudged to death for treason or any other offense without being arraigned and held to answer; and that regularly when the king's courts are open it is a time of peace in judgment of law," down to the present day, martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive of the liberty of the subject.

During the present century, an instructive debate on this question occurred in Parliament, occasioned by the trial and conviction by court-martial, at Demerara, of the Rev. John Smith, a missionary to the negroes, on the alleged ground of aiding and abetting a formidable rebellion in that colony. Those eminent statesmen, Lord Brougham and Sir James Mackintosh, participated in that debate; and denounced the trial as illegal; because it did not appear that the courts of law in Demerara could not try offenses, and that "when the laws can act, every other mode of punishing supposed crimes is itself an enormous crime."

So sensitive were our Revolutionary fathers on this subject, although Boston was almost in a state of siege, when General Gage issued his proclamation of martial law they spoke of it as an "attempt to supersede the course of the common law, and instead thereof to publish and order the use of martial law." The Virginia Assembly, also, denounced a similar measure on the part of Governor Dunmore "as an assumed power, which the king himself cannot exercise; because it annuls the law of the land and introduces the most execrable of all systems, martial law."

In some parts of the country, during the war of 1812, our officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the courts, were uniformly condemned as illegal. The cases of Smith v. Shaw, and McConnell v. Hampden (reported in 12 Johnson,)[1] are illustrations, which we cite, not only for the principles they determine, but on account of the distinguished jurists concerned in the decisions, one of whom for many years occupied a seat on this bench.

It is contended, that Luther v. Borden, decided by this court, is an authority for the claim of martial law advanced in this case. The decision is misapprehended. That case grew out of the attempt in Rhode Island to supersede the old colonial government by a revolutionary proceeding. Rhode Island, until that period, had no other form of local government than the charter granted by King Charles II in 1663; and as that limited the right of suffrage, and did not provide for its own amendment, many citizens became dissatisfied, because the legislature would not afford the relief in their power; and without the authority of law, formed a new and independent constitution, and proceeded to assert its authority by force of arms. The old government resisted this; and as the rebellion was formidable, called out the militia to subdue it, and passed an act declaring martial law. Borden, in the military service of the old government, broke open the house of Luther, who supported the new, in order to arrest him. Luther brought suit against Borden; and the question was, whether, under the constitution and laws of the state, Borden was justified. This court held that a state "may use its military power to put down an armed insurrection too strong to be controlled by the civil authority;" and, if the legislature of Rhode Island thought the peril so great as to require the use of its military forces and the declaration of martial law, there was no

[1] Pages 257 and 234.

ground on which this court could question its authority; and as Borden acted under military orders of the charter government, which had been recognized by the political power of the country, and was upheld by the state judiciary, he was justified in breaking into and entering Luther's house. This is the extent of the decision. There was no question in issue about the power of declaring martial law under the Federal Constitution, and the court did not consider it necessary even to inquire "to what extent nor under what circumstances that power may be exercised by a state."

We do not deem it important to examine further the adjudged cases; and shall, therefore, conclude without any additional reference to authorities.

To the third question, then, on which the judges below were opposed in opinion, an answer in the negative must be returned.

It is proper to say, although Milligan's trial and conviction by a military commission was illegal, yet, if guilty of the crimes imputed to him, and his guilt had been ascertained by an established court and impartial jury, he deserved severe punishment. Open resistance to the measures deemed necessary to subdue a great rebellion, by those who enjoy the protection of government, and have not the excuse even of prejudice of section to plead in their favor, is wicked; but that resistance becomes an enormous crime when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States. Conspiracies like these, at such a juncture, are extremely perilous; and those concerned in them are dangerous enemies to their country, and should receive the heaviest penalties of the law, as an example to deter others from similar criminal conduct. It is said the severity of the laws caused them; but Congress was obliged to enact severe laws to meet the crisis; and as our highest civil duty is to serve our country when in danger, the late war has proved that rigorous laws, when necessary, will be cheerfully obeyed by a patriotic people, struggling to preserve the rich blessings of a free government.

The two remaining questions in this case must be answered in the affirmative. The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.

If the military trial of Milligan was contrary to law, then he was entitled, on the facts stated in his petition, to be discharged from custody by the terms of the act of Congress of March 3, 1863. The provisions of this law having been considered in a previous part of this opinion, we will not restate the views there presented. Milligan avers he was a citizen of Indiana, not in the military or naval service, and was detained in close confinement, by order of the President, from the 5th day of October, 1864, until the 2d day of January, 1865, when the Circuit Court for the District of Indiana, with a grand jury, convened in session at Indianapolis; and afterwards, on the 27th day of the same month, adjourned without finding an indictment or presentment against him. If these averments were true (and their truth is conceded for the purposes of this case), the court was required to liberate him on taking certain oaths prescribed by the law, and entering into recognizance for his good behavior.

But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offense, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

This case, as well as the kindred cases of Bowles and Horsey, were disposed of at the last term, and the proper orders were entered of record. There is, therefore, no additional entry required.

[The CHIEF JUSTICE, for himself and MESSRS. JUSTICES WAYNE, SWAYNE, and MILLER, delivered an opinion in which he differed from the court in several important particulars, but concurred in the order made in the case.]

IX. EX POST FACTO LAWS AND BILLS OF ATTAINDER.

CALDER v. BULL.

3 Dallas, 386. Decided 1798.

In error from the State of Connecticut. The cause was argued at the last term (in the absence of the chief justice), and now the court delivered their opinions *seriatim*.

Chase, J. The decision of one question determines, in my opinion, the present dispute. I shall, therefore, state from the record no more of the case than I think necessary for the consideration of that question only.

The legislature of Connecticut, on the second Thursday of May, 1795, passed a resolution or law, which, for the reasons assigned, set aside a decree of the court of probate for Hartford, on the 21st of March, 1793, which decree disapproved of the will of Normand Morrison, the grandson, made the 21st of August, 1779, and refused to record the said will; and granted a new hearing by the said court of probate, with liberty of appeal therefrom, in six months. A new hearing was had, in virtue of this resolution, or law, before the said court of probate, who, on the 27th of July, 1795, approved the said will, and ordered it to be recorded. At August, 1795, appeal was then had to the superior court at Hartford, who, at February term, 1796, affirmed the decree of the court of probate. Appeal was had to the supreme court of errors of Connecticut, who, in June, 1796, adjudged that there were no errors. More than eighteen months elapsed from the decree of the court of probate, on the 1st of March, 1793, and thereby Caleb Bull and wife were barred of all right of appeal, by a statute of Connecticut. There was no law of that State whereby a new hearing, or trial, before the said court of probate might be obtained. Calder and wife claim the premises in question, in right of his wife, as heiress of N. Morrison, physician; Bull and wife claim under the will of N. Morrison, the grandson.

The counsel for the plaintiffs in error contend that the said

resolution or law of the legislature of Connecticut, granting a new hearing in the above case, is an ex post facto law, prohibited by the constitution of the United States; that any law of the federal government, or of any of the state governments, contrary to the constitution of the United States, is void; and that this court possesses the power to declare such law void.

It appears to me a self-evident proposition, that the several state legislatures retain all the powers of legislation delegated to them by the state constitutions, which are not expressly taken away by the constitution of the United States. The establishing courts of justice, the appointment of judges, and the making regulations for the administration of justice within each State, according to its laws, on all subjects not intrusted to the federal government, appear to me to be the peculiar and exclusive province and duty of the state legislatures. All the powers delegated by the people of the United States to the federal government are defined, and no constructive powers can be exercised by it, and all the powers that remain in the state governments are indefinite, except only in the constitution of Massachusetts.

The effect of the resolution or law of Connecticut above stated, is to revise a decision of one of its inferior courts, called the court of probate for Hartford, and to direct a new hearing of the case by the same court of probate that passed the decree against the will of Normand Morrison. By the existing law of Connecticut, a right to recover certain property had vested in Calder and wife (the appellants) in consequence of a decision of a court of justice, but, in virtue of a subsequent resolution or law, and the new hearing thereof, and the decision in consequence, this right to recover certain property was divested, and the right to the property declared to be in Bull and wife, the appellees. The sole inquiry is, whether this resolution or law of Connecticut, having such operation, is an ex post facto law within the prohibition of the federal constitution?

Whether the legislature of any of the States can revise and correct, by law, a decision of any of its courts of justice, although not prohibited by the constitution of the State, is a question of very great importance, and not necessary now to be determined, because the resolution or law in question does not go so far. I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution, or fundamental law of the State. The people of the United States erected their constitutions, or forms of government, to establish justice, to pro-

mote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit. There are acts which the federal or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A, and gives it to B. It is against all reason and justice for a people to intrust a legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit of our state governments amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt, or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our federal or state legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in our free republican governments.

All the restrictions contained in the constitution of the United

States, on the power of the state legislatures, were provided in favor of the authority of the federal government. The prohibition against their making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge that the parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less punishment. These acts were legislative judgments; and an exercise of judicial power. Sometimes they respected the crime, by declaring acts to be treason which were not treason when committed;[1] at other times they violated the rules of evidence, to supply a deficiency of legal proof, by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony which the courts of justice would not admit;[2] at other times they inflicted punishments where the party was not by law liable to any punishment;[3] and in other cases they inflicted greater punishment than the law annexed to the offense.[4] The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender; as if traitors, when discovered, could be so formidable, or the government so insecure. With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment and vindictive malice. To prevent such, and similar acts of violence and injustice, I believe the federal and state legislatures were prohibited from passing any bill of attainder, or any ex post facto law.

The constitution of the United States, art. 1, s. 9, prohibits the legislature of the United States from passing any ex post facto law; and in sec. 10 lays several restrictions on the authority of the legislatures of the several States; and among them, "that no State shall pass any ex post facto law."

It may be remembered that the legislatures of several of the States, to wit, Massachusetts, Pennsylvania, Delaware, Maryland, and North and South Carolina, are expressly prohibited, by their state constitutions, from passing any ex post facto law.

I shall endeavor to show what law is to be considered an ex post facto law, within the words and meaning of the prohibition

[1] The case of the Earl of Strafford, in 1640.

[2] The case of Sir John Fenwick, in 1696.

[3] The banishment of Lord Clarendon, 1667, 19 Car., 2, c. 10; and of Bishop Atterbury, in 1723, 9 Geo. I., c. 17.

[4] The Coventry Act, in 1670, 22 & 23 Car., 2, c. 1.

in the federal constitution. The prohibition, "that no State shall pass any ex post facto law," necessarily requires some explanation; for naked and without explanation it is unintelligible, and means nothing. Literally it is only that a law shall not be passed concerning, and after the fact, or thing done, or action committed. I would ask, what fact; of what nature or kind; and by whom done? That Charles I, king of England, was beheaded; that Oliver Cromwell was protector of England; that Louis XVI, late king of France, was guillotined,—are all facts that have happened, but it would be nonsense to suppose that the States were prohibited from making any law after either of these events, and with reference thereto. The prohibition in the letter is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this, that the legislatures of the several States shall not pass laws after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any ex post facto law, was to secure the person of the subject from injury or punishment, in consequence of such law. If the prohibition against making ex post facto laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and therefore improper, for both of them are retrospective.

I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are

manifestly unjust and oppressive. In my opinion, the true distinction is between ex post facto laws and retrospective laws. Every ex post facto law must necessarily be retrospective, but every retrospective law is not an ex post facto law; the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning, and after, the facts committed. But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent action criminal, and punishing it as a crime. The expressions "ex post facto laws" are technical; they had been in use long before the Revolution, and had acquired an appropriate meaning by legislators, lawyers, and authors. The celebrated and judicious Sir William Blackstone, in his Commentaries, considers an ex post facto law precisely in the same light I have done. His opinion is confirmed by his successor, Mr. Wooddeson, and by the author of the Federalist, whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government.

I also rely greatly on the definition, or explanation of ex post facto laws, as given by the conventions of Massachusetts, Maryland, and North Carolina, in their several constitutions, or forms of government.

In the declaration of rights, by the convention of Massachusetts, part first, section 24th, "Laws made to punish actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, &c."

In the declaration of rights, by the convention of Maryland, article 15th, "Retrospective laws punishing facts committed before

the existence of such laws, and by them only declared criminal, are oppressive, &c."

In the declaration of rights by the convention of North Carolina, article 24th, I find the same definition, precisely in the same words as in the Maryland constitution.

In the declaration of rights by the convention of Delaware, article 11th, the same definition was clearly intended, but inaccurately expressed; by saying, "laws punishing offenses (instead of actions, or facts) committed before the existence of such laws, are oppressive, &c."

I am of opinion, that the fact, contemplated by the prohibition, and not to be affected by a subsequent law, was some fact to be done by a citizen or subject.

In 2 Lord Raymond, 1352, Raymond, J., called the stat. 7 Geo. 1, stat. 2, pt. 8, about registering contracts for South Sea stock, an ex post facto law; because it affected contracts made before the statute.

In the present case, there is no fact done by Bull and wife, plaintiffs in error, that is in any manner affected by the law or resolution of Connecticut; it does not concern, or relate to, any act done by them. The decree of the court of probate of Hartford, on the 21st March, in consequence of which Calder and wife claim a right to the property in question, was given before the said law or resolution, and in that sense was affected and set aside by it; and in consequence of the law allowing a hearing and a decision in favor of the will, they have lost what they would have been entitled to, if the law or resolution, and the decision in consequence thereof, had not been made. The decree of the court of probate is the only fact on which the law or resolution operates. In my judgment the case of the plaintiffs in error is not within the letter of the prohibition; and, for the reasons assigned, I am clearly of opinion, that it is not within the intention of the prohibition; and if within the intention, but out of the letter, I should not, therefore consider myself justified to continue it within the prohibition, and therefore that the whole was void.

It was argued by the counsel for the plaintiffs in error, that the legislature of Connecticut had no constitutional power to make the resolution, or law, in question, granting a new hearing, &c.

Without giving an opinion, at this time, whether this court has jurisdiction to decide that any law made by congress, contrary to the constitution of the United States, is void, I am fully satisfied that this court has no jurisdiction to determine that any

law of any state legislature, contrary to the constitution of such State, is void. Further, if this court had such jurisdiction, yet it does not appear to me, that the resolution, or law, in question, is contrary to the charter of Connecticut, or its constitution, which is said by counsel to be composed of its charter, acts of assembly, and usages and customs. I should think that the courts of Connecticut are the proper tribunals to decide whether laws contrary to the constitution thereof are void. In the present case they have, both in the inferior and superior courts, determined that the resolution, or law, in question, was not contrary to either their State or the federal constitution.

To show that the resolution was contrary to the constitution of the United States, it was contended that the words, ex post facto law, have a precise and accurate meaning, and convey but one idea to professional men, which is, "by matter of after fact; by something after the fact." And Co. Litt., 241; Fearne's Cont. Rem. (old ed.), 175 and 203; Powell on Devises, 113, 133, 134, were cited; and the table to Coke's Reports (by Wilson), title ex post facto, was referred to. There is no doubt that a man may be a trespasser from the beginning, by matter of after fact; as where an entry is given by law, and the party abuses it; or where the law gives a distress, and the party kills, or works the distress.

I admit, an act unlawful in the beginning may, in some cases, become lawful by matter of after fact.

I also agree that the words "ex post facto" have the meaning contended for, and no other, in the cases cited, and in all similar cases where they are used unconnected with, and without relation to, legislative acts, or laws.

There appears to me a manifest distinction between the case where one fact relates to, and affects another fact, as where an after fact, by operation of law, makes a former fact either lawful or unlawful; and the case where a law made after a fact done, is to operate on, and to affect such fact. In the first case both the acts are done by private persons. In the second case the first act is done by a private person, and the second act is done by the legislature to affect the first act.

I believe that but one instance can be found in which a British judge called a statute that affected contracts made before the statute, an ex post facto law; but the judges of Great Britain always considered penal statutes, that created crimes, or increased the punishment of them, as ex post facto laws.

If the term ex post facto law is to be construed to include and to prohibit the enacting any law after a fact, it will greatly re-

strict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen.

If the prohibition to make no ex post facto law extends to all laws made after the fact, the two prohibitions, not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were improper and unnecessary.

It was further urged, that if the provision does not extend to prohibit the making any law after a fact, then all *choses in action*, all lands by devise, all personal property by bequest or distribution, by *elegit*, by execution, by judgments, particularly on torts, will be unprotected from the legislative power of the States; rights vested may be divested at the will and pleasure of the state legislatures; and, therefore, that the true construction and meaning of the prohibition is, that the States pass no law to deprive a citizen of any right vested in him by existing laws.

It is not to be presumed that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws; unless for the benefit of the whole community; and on making full satisfaction. The restraint against making any ex post facto laws was not considered, by the framers of the constitution, as extending to prohibit the depriving a citizen even of a vested right to property; or the provision, "that private property should not be taken for public use, without just compensation," was unnecessary.

It seems to me that the right of property, in its origin, could only arise from compact express, or implied, and I think it the better opinion, that the right, as well as the mode or manner of acquiring property, and of alienating or transferring, inheriting or transmitting it, is conferred by society, is regulated by civil institution, and is always subject to the rules prescribed by positive law. When I say that a right is vested in a citizen, I mean, that he has the power to do certain actions, or to possess certain things, according to the law of the land.

If any one has a right to property, such right is a perfect and exclusive right; but no one can have such right before he has acquired a better right to the property than any other person in the world; a right, therefore, only to recover property cannot be called a perfect and exclusive right. I cannot agree, that a right to property vested in Calder and wife, in consequence of the decree of the 21st of March, 1783, disapproving of the will of Morrison, the grandson. If the will was valid, Mrs. Calder could have no

right, as heiress of Morrison, the physician; but if the will was set aside, she had an undoubted title.

The resolution, or law, alone had no manner of effect on any right whatever vested in Calder and wife. The resolution, or law, combined with the new hearing, and the decision in virtue of it, took away their right to recover the property in question. But when combined they took away no right of property vested in Calder and wife; because the decree against the will, 21st March, 1783, did not vest in or transfer any property to them.

I am under a necessity to give a construction, or explanation of the words, "ex post facto," because they have not any certain meaning attached to them. But I will not go further than I feel myself bound to do; and if I ever exercise the jurisdiction, I will not decide any law to be void, but in a very clear case.

I am of the opinion that the decree of the supreme court of errors of Connecticut be affirmed, with costs.

[Justices Paterson, Iredell, and Cushing delivered concurring opinions.]

CUMMINGS v. THE STATE OF MISSOURI.

4 Wallace, 277. Decided 1866.

[The facts are sufficiently stated in the opinion of the court.]

Mr. Justice Field delivered the opinion of the court.

This case comes before us on a writ of error to the Supreme Court of Missouri, and involves a consideration of the test oath imposed by the constitution of that State. The plaintiff in error is a priest of the Roman Catholic Church, and was indicted and convicted in one of the circuit courts of the State of the crime of teaching and preaching as a priest and minister of that religious denomination without having first taken the oath, and was sentenced to pay a fine of five hundred dollars, and to be committed to jail until the same was paid. On appeal to the Supreme Court of the State, the judgment was affirmed.

The oath prescribed by the constitution, divided into its separable parts, embraces more than thirty distinct affirmations or tests. Some of the acts against which it is directed, constitute offenses of the highest grade, to which, upon conviction, heavy penalties are attached. Some of the acts have never been classed as offenses in the laws of any State, and some of the acts, under

many circumstances, would not even be blameworthy. It requires the affiant to deny not only that he has ever "been in armed hostility to the United States, or to the lawful authorities thereof," but, among other things, that he has ever, "by act or word," manifested his adherence to the cause of the enemies of the United States, foreign or domestic, or his desire for their triumph over the arms of the United States, or his sympathy with those engaged in rebellion, or has ever harbored or aided any person engaged in guerilla warfare against the loyal inhabitants of the United States, or has ever entered or left the State for the purpose of avoiding enrolment or draft in the military service of the United States; or, to escape the performance of duty in the militia of the United States, has ever indicated, in any terms, his disaffection to the government of the United States in its contest with the Rebellion.

Every person who is unable to take this oath is declared incapable of holding, in the State, "any office of honor, trust, or profit under its authority, or of being an officer, councilman, director, or trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority, or of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation."

And every person holding, at the time the constitution takes effect, any of the offices, trusts, or positions mentioned, is required, within sixty days thereafter, to take the oath; and, if he fail to comply with this requirement, it is declared that his office, trust, or position shall ipso facto become vacant.

No person, after the expiration of the sixty days, is permitted, without taking the oath, "to practice as an attorney or counsellor-at-law, nor after that period can any person be competent, as a bishop, priest, deacon, minister, elder, or other clergyman, of any religious persuasion, sect, or denomination, to teach, preach, or solemnize marriages."

Fine and imprisonment are prescribed as a punishment for holding or exercising any of "the offices, positions, trusts, professions, or functions" specified, without having taken the oath; and false swearing or affirmation in taking it is declared to be perjury, punishable by imprisonment in the penitentiary.

The oath thus required is, for its severity, without any precedent that we can discover. In the first place, it is retrospective; it embraces all the past from this day; and, if taken years hence,

it will also cover all the intervening period. In its retrospective feature we believe it is peculiar to this country. In England and France there have been test oaths, but they were always limited to an affirmation of present belief, or present disposition towards the government, and were never exacted with reference to particular instances of past misconduct. In the second place, the oath is directed not merely against overt and visible acts of hostility to the government, but is intended to reach words, desires, and sympathies, also. And, in the third place, it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity, or affection, or relationship. If one has ever expressed sympathy with any who were drawn into the Rebellion, even if the recipients of that sympathy were connected by the closest ties of blood, he is as unable to subscribe to the oath as the most active and the most cruel of the rebels, and is equally debarred from the offices of honor or trust, and the positions and employments specified.

But, as it was observed by the learned counsel who appeared on behalf of the State of Missouri, this court cannot decide the case upon the justice or hardship of these provisions. Its duty is to determine whether they are in conflict with the Constitution of the United States. On behalf of Missouri, it is urged that they only prescribe a qualification for holding certain offices, and practicing certain callings, and that it is therefore within the power of the State to adopt them. On the other hand, it is contended that they are in conflict with that clause of the Constitution which forbids any State to pass a bill of attainder or an ex post facto law.

We admit the propositions of the counsel of Missouri, that the States which existed previous to the adoption of the Federal Constitution possessed originally all the attributes of sovereignty; that they still retain those attributes, except as they have been surrendered by the formation of the Constitution, and the amendments thereto; that the new States, upon their admission into the Union, became invested with equal rights, and were thereafter subject only to similar restrictions, and that among the rights reserved to the States is the right of each State to determine the qualifications for office, and the conditions upon which its citizens may exercise their various callings and pursuits within its jurisdiction.

These are general propositions, and involve principles of the highest moment. But it by no means follows that, under the form of creating a qualification or attaching a condition, the States

can in effect inflict a punishment for a past act which was not punishable at the time it was committed. The question is not as to the existence of the power of the State over matters of internal police, but whether that power has been made in the present case an instrument for the infliction of punishment against the inhibition of the Constitution.

Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term to mean "any natural endowment or any acquirement which fits a person for a place, office, or employment, or enables him to sustain any character, with success. It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrolment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counsellor to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.

The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that "to punish one is to de-

prive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all." The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. By statute 9 and 10, William III, chap. 32, if any person educated in or having made a profession of the Christian religion, did "by writing, printing, teaching, or advised speaking," deny the truth of the religion, or the divine authority of the Scriptures, he was for the first offense rendered incapable to hold any office or place of trust; and for the second, he was rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, besides being subjected to three years' imprisonment without bail.[1]

By statute 1 George I, chap. 13, contempts against the king's title, arising from refusing or neglecting to take certain prescribed oaths, and yet acting in an office or place of trust for which they were required, were punished by incapacity to hold any public office; to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of Parliament; and the offender was also subject to a forfeiture of five hundred pounds to any one who would sue for the same.[2]

"Some punishments," says Blackstone, "consist in exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like."[3]

[1] 4 Black, 44.
[2] Id., 124.
[3] Id., 377.

In France, deprivation or suspension of civil rights, or of some of them, and among these of the right of voting, of eligibility to office, of taking part in family councils, of being guardian or trustee, of bearing arms, and of teaching or being employed in a school or seminary of learning, are punishments prescribed by her code.

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty, or property, but also embracing deprivation or suspension of political or civil rights, and the disabilities prescribed by the provisions of the Missouri constitution being in effect punishment, we proceed to consider whether there is any inhibition in the Constitution of the United States against their enforcement.

The counsel for Missouri closed his argument in this case by presenting a striking picture of the struggle for ascendancy in that State during the recent Rebellion between the friends and the enemies of the Union, and of the fierce passions which that struggle aroused. It was in the midst of the struggle that the present constitution was framed, although it was not adopted by the people until the war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amidst which the convention held its deliberations.

It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In Fletcher v. Peck,[4] Mr. Chief Justice Marshall, speaking of such action, uses this language: "Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The

[4] 6 Cranch, 137.

restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State."

"No State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.

"Bills of this sort," says Mr. Justice Story, "have been most usually passed in England in times of rebellion, or gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others."[5]

These bills are generally directed against individuals by name; but they may be directed against a whole class. The bill against the Earl of Kildare and others, passed in the reign of Henry VIII,[6] enacted that "all such persons which be or heretofore have been comforters, abettors, partakers, confederates, or adherents unto the said" late earl, and certain other parties, who were named, "in his or their false and traitorous acts and purposes, shall in likewise stand, and be attainted, adjudged, and convicted of high treason;" and that "the same attainder, judgment, and conviction against the said comforters, abettors, partakers, confederates, and adherents, shall be as strong and effectual in the law against them, and every of them, as though they and every of them had been specially, singularly, and particularly named by their proper names and surnames in the said act."

These bills may inflict punishment absolutely, or may inflict it conditionally.

[5] Commentaries, § 1344.

[6] 28 Henry VIII., chap. 18; 3 Stats. of the Realm, 694.

The bill against the Earl of Clarendon, passed in the reign of Charles the Second, enacted that the earl should suffer perpetual exile, and be forever banished from the realm; and that if he returned, or was found in England, or in any other of the king's dominions, after the first of February, 1667, he should suffer the pains and penalties of treason; with the proviso, however, that if he surrendered himself before the said first day of February for trial, the penalties and disabilities declared should be void and of no effect.[7]

"A British act of Parliament," to cite the language of the Supreme Court of Kentucky, "might declare, that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury."[8]

If the clauses of the second article of the constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty, of having been in armed hostility to the United States, or of having entered that State to avoid being enrolled or drafted into the military service of the United States, and, therefore, should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution of learning, there could be no question that the clauses would constitute a bill of attainder within the meaning of the Federal Constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibition of the Federal Constitution.

In all these cases there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.

The results which would follow from clauses of the character mentioned do follow from the clauses actually adopted. The dif-

[7] Printed in 6 Howell's State Trials, p. 391.

[8] Gaines v. Buford, 1 Dana, 510.

ference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

We proceed to consider the second clause of what Mr. Chief Justice Marshall terms a bill of rights for the people of each State—the clause which inhibits the passage of an ex post facto law.

By an ex post facto law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.

In Fletcher v. Peck, Mr. Chief Justice Marshall defined an ex post facto law to be one "which renders an act punishable in a manner in which it was not punishable when it was committed." "Such a law," said that eminent judge, "may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime, which was not declared by some previous law to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing for public use the estate of an individual, in the form of a law annulling the title by which he holds the estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the

effect of an ex post facto law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an ex post facto law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?"

The act to which reference is here made was one passed by the State of Georgia, rescinding a previous act, under which lands had been granted. The rescinding act, annulling the title of the grantees, did not, in terms, define any crimes, or inflict any punishment, or direct any judicial proceedings; yet, inasmuch as the legislature was forbidden from passing any law by which a man's estate could be seized for a crime, which was not declared such by some previous law rendering him liable to that punishment, the chief justice was of opinion that the rescinding act had the effect of an ex post facto law, and was within the constitutional prohibition.

The clauses in the Missouri constitution, which are the subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared. They assume that there are persons in Missouri who are guilty of some of the acts designated. They would have no meaning in the constitution were not such the fact. They are aimed at past acts, and not future acts. They were intended especially to operate upon parties who, in some form or manner, by action or words, directly or indirectly, had aided or countenanced Rebellion, or sympathized with parties engaged in the Rebellion, or had endeavored to escape the proper responsibilities and duties of a citizen in time of war; and they were intended to operate by depriving such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations. This deprivation is punishment; nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed. To them there is no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else.

Now, some of the acts to which the expurgatory oath is directed were not offenses at the time they were committed. It was no offense against any law to enter or leave the State of Missouri for the purpose of avoiding enrollment or draft in the military service of the United States, however much the evasion of such service might be the subject of moral censure. Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an ex post facto law—"they impose a punishment for an act not punishable at the time it was committed."

Some of the acts at which the oath is directed constituted high offenses at the time they were committed, to which, upon conviction, fine and imprisonment, or other heavy penalties, were attached. The clauses which provide a further penalty for these acts are also within the definition of an ex post facto law—"they impose additional punishment to that prescribed when the act was committed."

And this is not all. The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties.

The objectionable character of these clauses will be more apparent if we put them into the ordinary form of a legislative act. Thus, if instead of the general provisions in the constitution the convention had provided as follows: Be it enacted, that all persons who have been in armed hostility to the United States shall, upon conviction thereof, not only be punished as the laws provided at the time the offenses charged were committed, but shall also be thereafter rendered incapable of holding any of the offices, trusts, and positions, and of exercising any of the pursuits mentioned in the second article of the constitution of Missouri;—no one would have any doubt of the nature of the enactment. It would be an ex post facto law, and void; for it would add a new punishment for an old offense. So, too, if the convention had passed an enactment of a similar kind with reference to those acts which do not constitute offenses. Thus, had it provided as follows: Be it enacted, that all persons who have heretofore, at any time, entered or left the State of Missouri, with intent to avoid enrollment or draft in the military service of the United States,

shall, upon conviction thereof, be forever rendered incapable of holding any office of honor, trust, or profit in the State, or of teaching in any seminary of learning, or of preaching as a minister of the gospel of any denomination, or of exercising any of the professions or pursuits mentioned in the second article of the constitution;—there would be no question of the character of the enactment. It would be an ex post facto law, because it would impose a punishment for an act not punishable at the time it was committed.

The provisions of the constitution of Missouri accomplish precisely what enactments like those supposed would have accomplished. They impose the same penalty, without the formality of a judicial trial and conviction; for the parties embraced by the supposed enactments would be incapable of taking the oath prescribed; to them its requirement would be an impossible condition. Now, as the State, had she attempted the course supposed, would have failed, it must follow that any other mode producing the same result must equally fail. The provision of the Federal Constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end, can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named, against which the framers of the Constitution intended to guard, which may not be effected. Take the case supposed by counsel—that of a man tried for treason and acquitted, or, if convicted, pardoned—the legislature may nevertheless enact that, if the person thus acquitted or pardoned does not take an oath that he never has committed the acts charged against him, he shall not be permitted to hold any office of honor or trust or profit, or pursue any avocation in the State. Take the case before us;—the constitution of Missouri, as we have seen, excludes, on failure to take the oath prescribed by it, a large class of persons within her borders from numerous positions and pursuits; it would have been equally within the power of the State to have extended the exclusion so as to deprive the parties, who are unable to take the oath, from any avocation whatever in the State. Take still another case:—suppose that in the progress of events, persons now in the minority in the State should obtain the ascendancy, and secure the control of the government; nothing could prevent, if the constitutional prohibition can be evaded, the enactment of a provision requiring every person, as a condition of holding any position of honor or trust, or of pursuing any

avocation in the State, to take an oath that he had never advocated or advised or supported the imposition of the present expurgatory oath. Under this form of legislation the most flagrant invasion of private rights, in periods of excitement, may be enacted, and individuals, and even whole classes, may be deprived of political and civil rights.

A question arose in New York, soon after the treaty of peace of 1783, upon a statute of that State, which involved a discussion of the nature and character of these expurgatory oaths, when used as a means of inflicting punishment for past conduct. The subject was regarded as so important, and the requirement of the oath such a violation of the fundamental principles of civil liberty, and the rights of the citizen, that it engaged the attention of eminent lawyers and distinguished statesmen of the time, and among others of Alexander Hamilton. We will cite some passages of a paper left by him on the subject, in which, with his characteristic fullness and ability, he examines the oath, and demonstrates that it is not only a mode of inflicting punishment, but a mode in violation of all the constitutional guarantees, secured by the Revolution, of the rights and liberties of the people.

"If we examine it" (the measure requiring the oath), said this great lawyer, "with an unprejudiced eye, we must acknowledge, not only that it was an invasion of the treaty, but a subversion of one great principle of social security, to wit: that every man shall be presumed innocent until he is proved guilty. This was to invert the order of things; and instead of obliging the State to prove the guilt, in order to inflict the penalty, it was to oblige the citizen to establish his own innocence to avoid the penalty. It was to excite scruples in the honest and conscientious, and to hold out a bribe to perjury. . . . It was a mode of inquiry [as to] who had committed any of those crimes to which the penalty of disqualification was annexed, with this aggravation, that it deprived the citizen of the benefit of that advantage, which he would have enjoyed by leaving, as in all other cases, the burden of the proof upon the prosecutor.

"To place this matter in a still clearer light, let it be supposed that, instead of the mode of indictment and trial by jury, the legislature was to declare that every citizen who did not swear he had never adhered to the King of Great Britain should incur all the penalties which our treason laws prescribe. Would this not be a palpable evasion of the treaty, and a direct infringement of the Constitution? The principle is the same in both cases, with only this difference in the consequences—that in the instance already

acted upon the citizen forfeits a part of his rights; in the one supposed he would forfeit the whole. The degree of punishment is all that distinguishes the cases. In either, justly considered, it is substituting a new and arbitrary mode of prosecution to that ancient and highly esteemed one recognized by the laws and constitution of the State. I mean the trial by jury.

"Let us not forget that the Constitution declares that trial by jury, in all cases in which it has been formerly used, should remain inviolate forever, and that the legislature should at no time erect any new jurisdiction which should not proceed according to the course of the common law. Nothing can be more repugnant to the true genius of the common law than such an inquisition as has been mentioned into the consciences of men. . . . If any oath with retrospect to past conduct were to be made the condition on which individuals, who have resided within the British lines, should hold their estates, we should immediately see that this proceeding would be tyrannical, and a violation of the treaty; and yet, when the same mode is employed to divert that right, which ought to be deemed still more sacred, many of us are so infatuated as to overlook the mischief.

"To say that the persons who will be affected by it have previously forfeited that right, and that, therefore, nothing is taken away from them, is a begging of the question. How do we know who are the persons in this situation? If it be answered, this is the mode taken to ascertain it—the objection returns—'tis an improper mode; because it puts the most essential interests of the citizen upon a worse footing than we should be willing to tolerate where inferior interests were concerned; and because, to elude the treaty, it substitutes for the established and legal mode of investigating crimes and inflicting forfeitures, one that is unknown to the Constitution, and repugnant to the genius of our law." . . .

The judgment of the Supreme Court of Missouri must be reversed, and the cause remanded, with directions to enter a judgment reversing the judgment of the Circuit Court, and directing that court to discharge the defendant from imprisonment, and suffer him to depart without delay. *And it is so ordered.*

The CHIEF JUSTICE, and MESSRS. JUSTICES SWAYNE, DAVIS, and MILLER dissented. . . .

NOTE.—The case of Ex parte Garland, 4 Wallace, 333, presented a similar state of facts, and the dissenting opinion of Justice Miller, 4 Wallace, 382, applies to both these cases.

X. IMPAIRMENT OF CONTRACTS.

FLETCHER v. PECK.

6 Cranch, 87. Decided 1810.

ERROR to the circuit court of the United States for the district of Massachusetts, in an action of covenant brought by Fletcher against Peck. . . .

March 16, 1810. MARSHALL, C. J., delivered the opinion of the court as follows:

The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

This suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the State of Georgia, the contract for which was made in the form of a bill passed by the legislature of that State.

The first count in the declaration set forth a breach in the second covenant contained in the deed. The covenant is, "that the legislature of the State of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said act." The breach assigned is, that the legislature had no power to sell.

The plea in bar sets forth the constitution of the State of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that State. It then sets forth the granting act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The

only question, then, presented by this demurrer, for the consideration of the court, is this, did the then constitution of the State of Georgia prohibit the legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case the court can perceive no such opposition. In the constitution of Georgia, adopted in the year 1789, the court can perceive no restriction on the legislative power, which inhibits the passage of the act of 1795. They cannot say that, in passing that act, the legislature has transcended its powers, and violated the constitution.

In overruling the demurrer, therefore, to the first plea, the circuit court committed no error.

The third covenant is, that all the title which the State of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The second count assigns, in substance, as a breach of this covenant, that the original grantees from the State of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said State by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity, &c., and so the title of the State of Georgia did not pass to the said Peck, &c.

The plea to this count, after protesting that the promises it alleges were not made, avers, that until after the purchase made from the original grantees by James Greenleaf, under whom the

said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the legislature of the State of Georgia.

To this plea the plaintiff demurred generally, and the defendant joined in the demurrer.

That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the State itself, to vacate a contract thus formed, and to annul rights acquired under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a State, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

If the majority of the legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned.

Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the State of Georgia to annul the contract, nor does it appear to the court, by this count, that the State of Georgia is dissatisfied with the sale that has been made.

The case, as made out in the pleadings, is simply this. One individual who holds lands in the State of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favor of the law which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

The circuit court, therefore, did right in overruling this demurrer.

The fourth covenant in the deed is, that the title to the premises has been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the State of Georgia.

The third count recites the undue means practised on certain members of the legislature, as stated in the second count, and then alleges that, in consequence of these practices and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the State to the lands it contained. The count proceeds to recite at large this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void.

After protesting as before that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice.

To this plea there is a demurrer and joinder.

The importance and the difficulty of the questions presented by these pleadings, are deeply felt by the court.

The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the governor, made in pursuance of an act of assembly to which the legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

The legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice.

But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cease to be obligatory.

It is, however, to be recollected that the people can act only by these agents, and that, while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen, and if their contracts be examinable, the common sentiment, as well as common usage of mankind, points out a mode by which this examination may be made, and their validity determined.

If the legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

If the legislature be its own judge in its own case, it would seem equitable that its decisions should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are

purchasers without notice, for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned.

A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration.

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the legislature so to exert it.

It is not intended to speak with disrespect of the legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle, on which alone this rescinding act is to be supported, may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this: that a legislature may, by its own act, divest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferable; and those who purchased parts of it were not stained by that guilt which infected the original transaction.

Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well-known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be

viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American Union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several States, which none claim a right to pass. The constitution of the United States declares that no State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.

No State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the State may enter?

The State legislatures can pass no ex post facto law. An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making that distinction. This rescinding act would have the effect of an ex post facto law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an ex post facto law, or bill of attainder;

why, then, is it allowable in the form of a law annulling the original grant?

The argument in favor of presuming an intention to except a case, not excepted by the words of the constitution, is susceptible of some illustration from a principle originally engrafted in that instrument, though no longer a part of it. The constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual States. A State, then, which violated its own contract, was suable in the courts of the United States for that violation. Would it have been a defense in such a suit to say that the State had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defense could be set up. And yet, if a State is neither restrained by the general principles of our political institutions, nor by the words of the constitution, from impairing the obligation of its own contracts, such a defense would be a valid one. This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the 3d plea, therefore, there is no error. . . .

The question, whether the vacant lands within the United States became a joint property, or belonged to the separate States, was a momentous question, which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the court, that the particular land stated in the declaration appears, from this special verdict, to lie within the State of Georgia, and that the State of Georgia had power to grant it.

Some difficulty was produced by the language of the covenant, and of the pleadings. It was doubted whether a State can be seized in fee of lands subject to the Indian title, and whether a decision that they were seized in fee might not be construed to

amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.

The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the State.

Judgment affirmed, with costs.

[Mr. Justice Johnson delivered a separate opinion.]

STURGES v. CROWNINSHIELD.

4 Wheaton, 122. Decided 1819.

This was an action of assumpsit, brought in the circuit court of Massachusetts, against the defendant, as the maker of two promissory notes, both dated at New York, on the 22d of March, 1811, for the sum of $771.86 each, and payable to the plaintiff, one on the 1st of August, and the other on the 15th of August, 1811. The defendant pleaded his discharge under "An act for the benefit of insolvent debtors and their creditors," passed by the legislature of New York, the 3d day of April, 1811. After stating the provisions of the said act, the defendant's plea averred his compliance with them, and that he was discharged, and a certificate given to him the fifteenth day of February, 1812. To this plea there was a general demurrer, and joinder. At the October term of the circuit court, 1817, the cause came on to be argued and heard on the said demurrer, and the following questions arose, to wit:—

1. Whether, since the adoption of the constitution of the United States, any State has authority to pass a bankrupt law, or whether the power is exclusively vested in the congress of the United States?

2. Whether the act of New York, passed the third day of April, 1811, and stated in the plea in this case, is a bankrupt act, within the meaning of the constitution of the United States?

3. Whether the act aforesaid is an act or law impairing the obligation of contracts, within the meaning of the constitution of the United States?

4. Whether the plea is a good and sufficient bar of the plaintiff's action?

And after hearing counsel upon the questions, the judges of the circuit court were opposed in opinion thereupon; and upon motion of the plaintiff's counsel, the questions were certified to the supreme court, for their final decision. . . .

MARSHALL, C. J., delivered the opinion of the court.

This case is adjourned from the court of the United States, for the first circuit and the district of Massachusetts, on several points on which the judges of that court were divided, which are stated in the record, for the opinion of this court. The first is:—

Whether, since the adoption of the constitution of the United States, any State has authority to pass a bankrupt law, or whether the power is exclusively vested in the congress of the United States? . . .

Without entering further into the delicate inquiry respecting the precise limitations which the several grants of power to congress, contained in the constitution, may impose on the state legislatures, than is necessary for the decision of the question before the court, it is sufficient to say, that, until the power to pass uniform laws on the subject of bankruptcies be exercised by congress, the States are not forbidden to pass a bankrupt law, provided it contain no principle which violates the 10th section of the first article of the constitution of the United States.

This opinion renders it totally unnecessary to consider the question whether the law of New York is, or is not, a bankrupt law.

We proceed to the great question on which the cause must depend. Does the law of New York, which is pleaded in this case, impair the obligation of contracts, within the meaning of the constitution of the United States? This act liberates the person of the debtor, and discharges him from all liability for any debt previously contracted, on his surrendering his property in the manner it prescribes. In discussing the question whether a State is prohibited from passing such a law as this, our first inquiry is into the meaning of words in common use. What is the obligation of a contract? and what will impair it?

It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on

that day; and this is its obligation. Any law which releases a part of this obligation, m ' in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it.

The words of the constitution, then, are express, and incapable of being misunderstood. They admit of no variety of construction, and are acknowledged to apply to that species of contract, an engagement between man and man, for the payment of money, which has been entered into by these parties. Yet the opinion that this law is not within the prohibition of the constitution, has been entertained by those who are entitled to great respect, and has been supported by arguments which deserve to be seriously considered.

It has been contended, that as a contract can only bind a man to pay to the full extent of his property, it is an implied condition that he may be discharged on surrendering the whole of it.

But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents, and integrity, constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation.

It has been argued, that the States are not prohibited from passing bankrupt laws, and that the essential principle of such laws is to discharge the bankrupt from all past obligations; that the States have been in the constant practice of passing insolvent laws, such as that of New York, and if the framers of the constitution had intended to deprive them of this power, insolvent laws would have been mentioned in the prohibition; that the prevailing evil of the times, which produced this clause in the constitution, was the practice of emitting paper money, of making property which was useless to the creditor a discharge of his debt, and of changing the time of payment by authorizing distant installments. Laws of this description, not insolvent laws, constituted, it is said, the mischief to be remedied; and laws of this description, not insolvent laws, are within the true spirit of the prohibition.

The constitution does not grant to the States the power of passing bankrupt laws, or any other power; but finds them in possession of it, and may either prohibit its future exercise entirely, or restrain it so far as national policy may require. It has so far restrained it as to prohibit the passage of any law impairing the

obligation of contracts. Although, then, the States may, until that power shall be exercised by congress, pass laws concerning bankrupts, yet they cannot constitutionally introduce into such laws a clause which discharges the obligations the bankrupt has entered into. It is not admitted that without this principle, an act cannot be a bankrupt law; and if it were, that admission would not change the constitution, nor exempt such acts from its prohibitions.

The argument drawn from the omission in the constitution to prohibit the States from passing insolvent laws, admits of several satisfactory answers. It was not necessary, nor would it have been safe, had it even been the intention of the framers of the constitution to prohibit the passage of all insolvent laws, to enumerate particular subjects to which the principle they intended to establish should apply. The principle was the inviolability of contracts. This principle was to be protected in whatsoever form it might be assailed. To what purpose enumerate the particular modes of violation which should be forbidden, when it was intended to forbid all? Had an enumeration of all the laws which might violate contracts been attempted, the provision must have been less complete, and involved in more perplexity than it now is. The plain and simple declaration, that no State shall pass any law impairing the obligation of contracts, includes insolvent laws and all other laws, so far as they infringe the principle the convention intended to hold sacred, and no further.

But a still more satisfactory answer to this argument is, that the convention did not intend to prohibit the passage of all insolvent laws. To punish honest insolvency by imprisonment for life, and to make this a constitutional principle, would be an excess of inhumanity which will not readily be imputed to the illustrious patriots who framed our constitution, nor to the people who adopted it. The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation.

The argument which has been pressed most earnestly at the bar,

is, that, although all legislative acts which discharge the obligation of a contract without performance, are within the very words of the constitution, yet an insolvent act, containing this principle, is not within its spirit, because such acts have been passed by colonial and state legislatures from the first settlement of the country, and because we know from the history of the times, that the mind of the convention was directed to other laws, which were fraudulent in their character, which enabled the debtor to escape from his obligation, and yet hold his property; not to this, which is beneficial in its operation.

Before discussing this argument, it may not be improper to premise that, although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.

This is certainly not such a case. It is said the colonial and state legislatures have been in the habit of passing laws of this description for more than a century; that they have never been the subject of complaint, and, consequently, could not be within the view of the general convention.

The fact is too broadly stated. The insolvent laws of many, indeed, of by far the greater number of the States, do not contain this principle. They discharge the person of the debtor, but leave his obligation to pay in full force. To this the constitution is not opposed.

But, were it even true that this principle had been introduced generally into those laws, it would not justify our varying the construction of the section. Every State in the Union, both while a colony and after becoming independent, had been in the practice of issuing paper money; yet this practice is, in terms, prohib-

ited. If the long exercise of the power to emit bills of credit did not restrain the convention from prohibiting its future exercise, neither can it be said that the long exercise of the power to impair the obligation of contracts, should prevent a similar prohibition. It is not admitted that the prohibition is more express in the one case than in the other. It does not, indeed, extend to insolvent laws by name, because it is not a law by name, but a principle which is to be forbidden; and this principle is described in as appropriate terms as our language affords.

Neither, as we conceive, will any admissible rule of construction justify us in limiting the prohibition under consideration, to the particular laws which have been described at the bar, and which furnished such cause for general alarm. What were those laws?

We are told they were such as grew out of the general distress following the war in which our independence was established. To relieve this distress paper money was issued; worthless lands, and other property of no use to the creditor, were made a tender in payment of debts; and the time of payment, stipulated in the contract, was extended by law. These were the peculiar evils of the day. So much mischief was done, and so much more was apprehended, that general distrust prevailed, and all confidence between man and man was destroyed. To laws of this description therefore, it is said, the prohibition to pass laws impairing the obligation of contracts ought to be confined.

Let this argument be tried by the words of the section under consideration. Was this general prohibition intended to prevent paper money? We are not allowed to say so, because it is expressly provided, that no State shall "emit bills of credit;" neither could these words be intended to restrain the States from enabling debtors to discharge their debts by the tender of property of no real value to the creditor, because for that subject also particular provision is made. Nothing but gold and silver coin can be made a tender in payment of debts.

It remains to inquire, whether the prohibition under consideration could be intended for the single case of a law directing that judgments should be carried into execution by instalments?

This question will scarcely admit of discussion. If this was the only remaining mischief against which the constitution intended to provide, it would undoubtedly have been, like paper money and tender laws, expressly forbidden. At any rate, terms more directly applicable to the subject, more appropriately expressing the intention of the convention, would have been used.

It seems scarcely possible to suppose that the framers of the constitution, if intending to prohibit only laws authorizing the payment of debts by instalments, would have expressed that intention by saying, "no State shall pass any law impairing the obligation of contracts." No men would so express such an intention. No men would use terms embracing a whole class of laws, for the purpose of designating a single individual of that class. No court can be justified in restricting such comprehensive words to a particular mischief to which no allusion is made.

The fair, and we think, the necessary construction of the sentence, requires, that we should give these words their full and obvious meaning. A general dissatisfaction with that lax system of legislation which followed the war of our Revolution, undoubtedly directed the mind of the convention to this subject. It is probable that laws such as those which have been stated in argument, produced the loudest complaints, were most immediately felt. The attention of the convention, therefore, was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But, in the opinion of the convention, much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle, that contracts should be inviolable. The constitution, therefore, declares, that no State shall pass "any law impairing the obligation of contracts."

If, as we think, it must be admitted that this intention might actuate the convention; that it is not only consistent with, but is apparently manifested by, all that part of the section which respects this subject; that the words used are well adapted to the expression of it; that violence would be done to their plain meaning by understanding them in a more limited sense; those rules of construction, which have been consecrated by the wisdom of ages, compel us to say, that these words prohibit the passage of any law discharging a contract without performance.

By way of analogy, the statutes of limitations, and against usury, have been referred to in argument; and it has been supposed that the construction of the constitution, which this opinion maintains, would apply to them also, and must therefore be too extensive to be correct.

We do not think so. Statutes of limitations relate to the remedies which are furnished in the courts. They rather establish, that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance. If, in a State where six years may be pleaded in bar to an action of assumpsit, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there could be little doubt of its unconstitutionality.

So with respect to the laws against usury. If the law be, that no person shall take more than six per centum per annum for the use of money, and that, if more be reserved, the contract shall be void, a contract made thereafter reserving seven per cent., would have no obligation in its commencement; but if a law should declare that contracts already entered into, and reserving the legal interest, should be usurious and void, either in the whole or in part, it would impair the obligation of the contract, and would be clearly unconstitutional.

This opinion is confined to the case actually under consideration. It is confined to a case in which a creditor sues in a court, the proceedings of which the legislature, whose act is pleaded, had not a right to control, and to a case where the creditor had not proceeded to execution against the body of his debtor, within the State whose law attempts to absolve a confined insolvent debtor from his obligation. When such a case arises it will be considered.

It is the opinion of the court, that the act of the State of New York, which is pleaded by the defendant in this cause, so far as it attempts to discharge this defendant from the debt in the declaration mentioned, is contrary to the constitution of the United States, and that the plea is no bar to the action. . . . .

THE TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD.

4 Wheaton, 518. Decided 1819.

[The facts are sufficiently stated in the opinion of the court.]

MARSHALL, C. J., delivered the opinion of the court, as follows:

This is an action of trover, brought by the Trustees of Dartmouth College, against William H. Woodward, in the state court

of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June, and on the 18th of December, 1816, be valid, and binding on the trustees without their assent, and not repugnant to the constitution of the United States; otherwise it finds for the plaintiffs.

The superior court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States?

This court can be insensible neither to the magnitude nor to the delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a State is to be revised; an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the constitution of the United States, that "no State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." In the same instrument they have also said, "that the judicial power shall also extend to all cases in law and equity arising under the constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink.

The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of

June, 1816, and is entitled "An act to amend the charter and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the State, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives of New Hampshire, and the governor and lieutenant-governor of Vermont, for the time being, are to be members ex officio. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

The points for consideration are,

1. Is this contract protected by the constitution of the United States?

2. Is it impaired by the acts under which the defendant holds?

1. On the first point it has been argued that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a State for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its

broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt, and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the State legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It has never been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any State legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

The parties in this case differ less on general principles, less

on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it creates a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives in the eye of the law as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter.

It becomes then the duty of the court most seriously to examine this charter, and to ascertain its true character.

From the instrument itself it appears that about the year 1754 the Rev. Eleazer Wheelock established at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carryng on and extending his undertaking. In this pious work he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others trustees of the money which had been and should be contributed; which appointment Dr. Wheelock

confirmed by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut River, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English, and the proprietors in the neighborhood having made large offers of land on condition that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation, and represented the expediency of appointing those whom he had, by his last will, named as trustees in America, to be members of the proposed corporation. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," &c., "and also of English youth and any others," the charter was granted, and the Trustees of Dartmouth College were by that name created a body corporate, with power, for the use of the said college, to acquire real and personal property, and to pay the president, tutors, and other officers of the college such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power by his last will to appoint a successor, who is to continue in office until disapproved by the trustees. In cases of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body by death, resignation, removal, or disability; and also to make orders, ordinances, and laws for the government of the college, the same not being repugnant to the laws of Great Britain or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to and vested in the corporate body.

From this brief review of the most essential parts of the charter, it is apparent that the funds of the college consisted entirely of private donations. It is, perhaps, not very important who were the donors. The probability is that the Earl of Dartmouth and the other trustees in England were, in fact, the largest contributors. Yet the legal conclusion from the facts recited in the

charter would probably be, that Dr. Wheelock was the founder of the college.

The origin of the institution was, undoubtedly, the Indian charity school established by Dr. Wheelock at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees, who received the money, were appointed by and acted under his authority. It is not too much to say that the funds were obtained by him in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him in his last will as the trustees of his charity school compose a part of the corporation, and he is declared to be the founder of the college and its president for life. Were the inquiry material, we should feel some hesitation in saying that Dr. Wheelock was not, in law, to be considered as the founder (1 Bl. Com., 481) of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn, and these salaries lessen the expense of education to the students. It is then an eleemosynary (1 Bl. Com., 471) and, as far as respects its funds, a private corporation.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?

That education is an object of national concern and a proper subject of legislation, all admit. That there may be an institution founded by government and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Dr. Wheelock, as the keeper of his charity school, instructing the Indians in the art of reading and in our holy religion, sustaining them at his own expense and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have supposed that his private funds, or those given by others, were subject to legislative management because they were applied to the purposes of education. When, afterwards, his school was enlarged, and the liberal contributions made in England and in America enabled him to extend his cares to the education of the youth of his own country, no change was wrought in his own character or in the nature of his duties. Had he employed assistant tutors with the funds contributed by others, or had the trustees in England established a school with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact that they were employed in the education of youth could not have converted them into public officers concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust uncontrolled by legislative authority.

Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn, for its foundation is purely private and eleemosynary,—not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the haz-

ardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power or a political character than immortality would confer such power or character on a natural person. It is no more a State instrument than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property in a particular form and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant. In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable or public-spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design securely and certainly without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full com-

pensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purpose. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act change the character of a private eleemosynary institution.

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an act of incorporation, proceeds thus: "Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and also that the best means of education be established, in our province of New Hampshire, for the benefit of said province, do, of our special grace," etc. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate that the "benefit intended for the province" is that which is derived from "establishing the best means of education therein;" that is, from establishing in the province Dartmouth College as constituted by the charter.

But if these words, considered alone, could admit of doubt, that doubt is completely removed by an inspection of the entire instrument.

The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was "most subservient to the great ends in view," and because liberal donations of land were offered by the proprietors on condition that the institution should be there established. The real advantages from the location of the college are, perhaps, not less considerable to those on the west than to those on the east side of Connecticut River. The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth and any others." So that the objects of the contributors and the incorporating act were the same,—the promotion of Christianity and of education generally, not the interests of New Hampshire particularly.

From this review of the charter, it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form or even of its existence. The students are

fluctuating, and no individual among our youth has a vested interest in the institution which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the constitution intended to withdraw from the power of State legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the constitution is solicitous, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him and them to perpetuate their beneficent intention. It was granted. An artificial, immortal being was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors or their posterity, but for something, in their opinion, of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted, and protected by the corporation. They were as completely out of the donors, at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a

shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had parliament, immediately after the emanation of this charter and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowleged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State legislatures. But although a particular and a rare case may not in itself be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this

particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case, being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the constitution not warranted by its words? Are contracts of this description of a character to excite so little interest that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration as to compel us, or rather permit us to say, that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations, they are identified with, and personated by, the trustees, and their rights are to be defended and maintained by them. Religion, charity, and education are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States that contracts for their benefit must be excluded from the protection of words which in their natural import include them? Or do such contracts so necessarily require new modelling by the authority of the legislature that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration?

All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited proves

that they are not. The framers of the constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science by reserving to the government of the Union the power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." They have so far withdrawn science and the useful arts from the action of the State governments. Why, then, should they be supposed so regardless of contracts made for the advancement of literature as to intend to exclude them from provisions made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the constitution; neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind to enable us to determine that one great inducement to these gifts is the conviction felt by the giver that the disposition he makes of them is immutable. It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an act of incorporation constitutes no security for the institution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive, hope that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our constitution were strangers to it; and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy and repeated interferences produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such

an exception must be very powerful to justify the construction which makes it.

The motives suggested at the bar grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption that, if allowed to continue themselves, they now are, and must remain forever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the legislature.

It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must necessarily partake of the spirit of their origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college, and to guide the students. Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter by the crown, but at whose suggestion were they named? By whom were they selected? The charter informs us. Dr. Wheelock had represented, "that, for many weighty reasons, it would be expedient that the gentlemen whom he had already nominated in his last will to be trustees in America, should be of the corporation now proposed." When, afterwards, the trustees are named in the charter, can it be doubted that the persons mentioned by Dr. Wheelock in his will were appointed? Some were probably added by the crown, with the approbation of Dr. Wheelock. Among these is the doctor himself. If any others were appointed at the instance of the crown, they are the governor, three members of the council, and the speaker of the house of representatives of the colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the crown. If in the Revolution that followed, they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation which suspicion might excite would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evidence which we possess of the character of Dr.

Wheelock is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion that he united a sound understanding to that humanity and benevolence which suggested his undertaking. It surely cannot be assumed that his trustees were selected without judgment. With as little probability can it be assumed that, while the light of science and of liberal principles pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that, while the human race is rapidly advancing, they are stationary. Reasoning a priori, we should believe that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors, men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the constitution which should exclude these contracts from the protection of a provision whose terms comprehend them.

The opinion of the court, after mature deliberation is, that this is a contract, the obligation of which cannot be impaired without violating the constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this court.

2. We next proceed to the inquiry whether its obligation has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers.

From the review of this charter which has been taken it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown it was expressly stipulated that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms without impairing its obligation.

By the Revolution the duties as well as the powers of government devolved on the people of New Hampshire. It is admitted that among the latter was comprehended the transcendent power

of parliament, as well as that of the executive department. It is too clear to require the support of argument that all contracts and rights respecting property remained unchanged by the Revolution. The obligations, then, which were created by the charter to Dartmouth College were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present constitution of the United States would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature to be found in the constitution of the State. But the constitution of the United States has imposed this additional limitation, that the legislature of a State shall pass no act "impairing the obligation of contracts."

It has been already stated that the act "to amend the charter and enlarge and improve the corporation of Dartmouth College" increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the State, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law two opinions cannot be entertained. Between acting directly and acting through the agency of trustees and overseers no essential difference is perceived. The whole power of governing the college is transformed from trustees appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the State. The will of the State is substituted for the will of the donors in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave to the objects for which those funds were given; they contracted also to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized; and reorganized in such

a manner as to convert a literary institution, molded according to the will of its founders and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given.

In the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet it is not clear that the trustees ought to be considered as destitute of such beneficial interest in themselves as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea that trustees may also be tutors with salaries. The first president was one of the original trustees; and the charter provides, that in case of vacancy in that office, "the senior professor or tutor, being one of the trustees, shall exercise the office of president, until the trustees shall make choice of, and appoint a president." According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted, that those contracts only are protected by the constitution, a beneficial interest in which is vested in the party who appears in court to assert that interest; yet it is by no means clear that the Trustees of Dartmouth College have no beneficial interest in themselves.

But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the state court must, therefore, be reversed.

[JUSTICES WASHINGTON and STORY delivered concurring opinions. JUSTICE JOHNSON concurred for the reasons stated by the Chief Justice; JUSTICE LIVINGSTON concurred for the reasons stated by the Chief Justice and by JUSTICES WASHINGTON and STORY. JUSTICE DUVALL dissented.]

NOTE.—"It may well be doubted whether any decision ever delivered by any court has had such a pervading operation and influence in controlling legislation as this. The legislation, however, so controlled, has been that of the States of the Union." Miller, Lectures on the Constitution of the United States, 391.

OGDEN v. SAUNDERS.

12 Wheaton, 213. Decided 1827.

ERROR to the district court of the United States for Louisiana.

This was an action of assumpsit, brought in the court below, by the defendant in error, Saunders, a citizen of Kentucky, against the plaintiff in error, Ogden, a citizen of Louisiana. The plaintiff below declared upon certain bills of exchange, drawn on the 30th of September, 1806, by one Jordan, at Lexington, in the State of Kentucky, upon the defendant below, Ogden, in the city of New York (the defendant then being a citizen and resident of the State of New York), accepted by him at the city of New York, and protested for non-payment.

The defendant below pleaded several pleas, among which was a certificate of discharge under the act of the legislature of the State of New York, of April 3, 1801, for the relief of insolvent debtors, commonly called the three-fourths act.

The jury found the facts in the form of a special verdict, on which the court rendered a judgment for the plaintiff below, and the cause was brought by writ of error before this court. The question which arose under this plea as to the validity of the law of New York as being repugnant to the constitution of the United States, was argued at February term, 1824, . . . and the cause was continued for advisement until the present term. It was again argued at the present term (in connection with several other causes standing on the calendar, and involving the general

question of the validity of the state bankrupt, or insolvent laws).

. . .

The learned judges delivered their opinions as follows:—

WASHINGTON, J. The first and most important point to be decided in this cause turns essentially upon the question, whether the obligation of a contract is impaired by a State bankrupt or insolvent law, which discharges the person and the future acquisitions of the debtor from his liability under a contract entered into in that State after the passage of the act.

This question has never before been distinctly presented to the consideration of this court, and decided, although it has been supposed by the judges of a highly respectable state court that it was decided in the case of M'Millan v. M'Neal, 4 W., 209. That was the case of a debt contracted by two citizens of South Carolina, in that State, the discharge of which had a view to no other State. The debtor afterwards removed to the territory of Louisiana, where he was regularly discharged, as an insolvent, from all his debts, under an act of the legislature of that State passed prior to the time when the debt in question was contracted. To an action brought by the creditor in the district court of Louisiana, the defendant plead in bar his discharge, under the law of that territory, and it was contended by the counsel for the debtor in this court, that the law under which the debtor was discharged, having passed before the contract was made, it could not be said to impair its obligation. The cause was argued on one side only, and it would seem from the report of the case, that no written opinion was prepared by the court. The chief justice stated that the circumstance of the state law under which the debt was attempted to be discharged having been passed before the debt was contracted, made no difference in the application of the principle which had been asesrted by the court in the case of Sturges v. Crowninshield, 4 W., 122. The correctness of this position is believed to be incontrovertible. The principle alluded to was, that a state bankrupt law which impairs the obligation of a contract, is unconstitutional in its application to such contract. In that case, it is true, the contract preceded in order of time the act of assembly, under which the debtor was discharged, although it was not thought necessary to notice that circumstance in the opinion which was pronounced. The principle, however, remained, in the opinion of the court delivered in M'Millan v. M'Neal, unaffected by the circumstance that the law of Louisiana preceded a contract made in another State; since that law, having no extra-territorial force, never did

at any time govern or affect the obligation of such contract. It could not, therefore, be correctly said to be prior to the contract, in reference to its obligation; since if, upon legal principles, it could affect the contract, that could not happen until the debtor became a citizen of Louisiana, and that was subsequent to the contract. But I hold the principle to be well established, that a discharge under the bankrupt laws of one government does not affect contracts made or to be executed under another, whether the law be prior or subsequent in the date to that of the contract; and this I take to be the only point really decided in the case alluded to. Whether the chief justice was correctly understood by the reporter, when he is supposed to have said, "that this case was not distinguishable in principle from the preceding case of Sturges v. Crowninshield," it is not material at this time to inquire, because I understand the meaning of these expressions to go no further than to intimate that there was no distinction between the cases as to the constitutional objection, since it professed to discharge a debt contracted in another State, which, at the time it was contracted, was not within its operation, nor subject to be discharged by it. The case now to be decided, is that of a debt contracted in the State of New York, by a citizen of that State, from which he was discharged, so far as he constitutionally could be, under a bankrupt law of that State, in force at the time when the debt was contracted. It is a case, therefore, that bears no resemblance to the one just noticed.

I come now to the consideration of the question, which, for the first time, has been directly brought before this court for judgment. . . .

It has constantly appeared to me, throughout the different investigations of this question to which it has been my duty to attend, that the error of those who controvert the constitutionality of the bankrupt law under consideration, in its application to this case, if they be in error at all, has arisen from not distinguishing accurately between a law which impairs a contract, and one which impairs its obligation. A contract is defined by all to be an agreement to do or not to do some particular act; and in the construction of this agreement, depending essentially upon the will of the parties between whom it is formed, we seek for their intention with a view to fulfill it. Any law, then, which enlarges, abridges or in any manner changes this intention, when it is discovered, necessarily impairs the contract itself, which is but the evidence of that intention. . . .

What is it, then, which constitutes the obligation of a con-

tract? The answer is given by the chief justice, in the case of Sturges v. Crowninshield, to which I readily assent now, as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction, or discharge.

But the question, which law is referred to in the above definition, still remains to be solved. It cannot, for a moment, be conceded that the mere moral law is intended, since the obligation which that imposes is altogether of the imperfect kind which the parties to it are free to obey or not, as they please. It cannot be supposed that it was with this law the grave authors of this instrument were dealing.

The universal law of all civilized nations, which declares that men shall perform that to which they have agreed, has been supposed by the counsel who have argued this cause for the defendant in error, to be the law which is alluded to; and I have no objection to acknowledging its obligation, whilst I must deny that it is that which exclusively governs the contract. It is upon this law that the obligation which nations acknowledge to perform their compacts with each other is founded, and I, therefore, feel no objection to answer the question asked by the same counsel—what law it is which constitutes the obligation of the compact between Virginia and Kentucky—by admitting, that it is this common law of nations which requires them to perform it. I admit further that it is this law which creates the obligation of a contract made upon a desert spot, where no municipal law exists, and (which was another case put by the same counsel) which contract, by the tacit assent of all nations, their tribunals are authorized to enforce.

But can it be seriously insisted that this, any more than the moral law upon which it is founded, was exclusively in the contemplation of those who framed this constitution? What is the language of this universal law? It is simply that all men are bound to perform their contracts. The injunction is as absolute as the contracts to which it applies. It admits of no qualification and no restraint, either as to its validity, construction, or discharge, further than may be necessary to develop the intention of the parties to the contract. And if it be true that this is exclusively the law, to which the constitution refers us, it is very apparent that the sphere of state legislation upon subjects connected with the contracts of individuals, would be abridged beyond what it can for a moment be believed the sovereign States of this Union would

have consented to; for it will be found, upon examination, that there are few laws which concern the general police of a State, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into, or may thereafter form. For what are laws of evidence, or which concern remedies—frauds and perjuries—laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern-keepers, and a multitude of others which crowd the codes of every State, but laws which may affect the validity, construction, or duration, or discharge of contracts? Whilst I admit, then, that this common law of nations, which has been mentioned, may form in part the obligation of a contract, I must unhesitatingly insist that this law is to be taken in strict subordination to the municipal laws of the land where the contract is made, or is to be executed. The former can be satisfied by nothing short of performance; the latter may affect and control the validity, construction, evidence, remedy, performance, and discharge of the contract. The former is the common law of all civilized nations, and of each of them; the latter is the peculiar law of each, and is paramount to the former whenever they come in collision with each other.

It is, then, the municipal law of the State, whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, wherever its performance is sought to be enforced.

It forms, in my humble opinion, a part of the contract, and travels with it wherever the parties to it may be found. It is so regarded by all the civilized nations of the world, and is enforced by the tribunals of those nations according to its own forms, unless the parties to it have otherwise agreed, as where the contract is to be executed in, or refers to the laws of, some other country than that in which it is formed, or where it is of an immoral character, or contravenes the policy of the nation to whose tribunals the appeal is made; in which latter cases the remedy which the comity of nations affords for enforcing the obligation of contracts wherever formed, is denied. Free from these objections, this law, which accompanies the contract as forming a part of it, is regarded and enforced everywhere, whether it affect the validity, construction, or discharge of the contract. It is upon this principle of universal law, that the discharge of the contract, or of one of the parties to it, by the bankrupt laws of the country where it was made, operates as a discharge everywhere.

If, then, it be true that the law of the country where the contract is made or to be executed, forms a part of that contract and of its obligation, it would seem to be somewhat of a solecism to say that it does, at the same time, impair that obligation.

But it is contended that if the municipal law of the State where the contract is so made form a part of it, so does that clause of the constitution which prohibits the States from passing laws to impair the obligation of contracts; and, consequently, that the law is rendered inoperative by force of its controlling associate. All this I admit, provided it be first proved that the law so incorporated with and forming a part of the contract does, in effect, impair its obligation; and before this can be proved, it must be affirmed and satisfactorily made out, that if, by the terms of the contract, it is agreed that, on the happening of a certain event, as, upon the future insolvency of one of the parties, and his surrender of all his property for the benefit of his creditors, the contract shall be considered as performed and at an end, this stipulation would impair the obligation of the contract. If this proposition can be successfully affirmed, I can only say, that the soundness of it is beyond the reach of my mind to understand.

Again, it is insisted that if the law of the contract forms a part of it, the law itself cannot be repealed without impairing the obligation of the contract. This proposition I must be permitted to deny. It may be repealed at any time, at the will of the legislature, and then it ceases to form any part of those contracts which may afterwards be entered into. The repeal is no more void than a new law would be which operates upon contracts to affect their validity, construction, or duration. Both are valid (if the view which I take of this case be correct), as they may affect contracts afterwards formed; but neither are so, if they bear upon existing contracts; and, in the former case, in which the repeal contains no enactment, the constitution would forbid the application of the repealing law to past contracts, and to those only.

To illustrate this argument, let us take four laws, which, either by new enactments, or by the repeal of former laws, may affect contracts as to their validity, construction, evidence, or remedy.

Laws against usury are of the first description.

A law which converts a penalty, stipulated for by the parties, as the only atonement for a breach of the contract, into a mere agreement for a just compensation, to be measured by the legal rate of interest, is of the second.

The statute of frauds, and the statute of limitations, may be cited as examples of the last two.

The validity of these laws can never be questioned by those who accompany me in the view which I take of the question under consideration, unless they operate, by their express provisions, upon contracts previously entered into; and even then they are void only so far as they do so operate; because, in that case, and in that case only, do they impair the obligation of those contracts. But if they equally impair the obligation of contracts subsequently made, which they must do, if this be the operation of a bankrupt law upon such contracts, it would seem to follow that all such laws, whether in the form of new enactments, or of repealing laws, producing the same legal consequences, are made void by the constitution; and yet the counsel for the defendants in error have not ventured to maintain so alarming a proposition.

If it be conceded that those laws are not repugnant to the constitution, so far as they apply to subsequent contracts, I am yet to be instructed how to distinguish between those laws, and the one now under consideration. How has this been attempted by the learned counsel who have argued this cause upon the ground of such a distinction?

They have insisted that the effect of the law first supposed, is to annihilate the contract in its birth, or rather to prevent it from having a legal existence, and consequently, that there is no obligation to be impaired. But this is clearly not so, since it may legitimately avoid all contracts afterwards entered into, which reserve to the lender a higher rate of interest than this law permits.

The validity of the second law is admitted, and yet this can only be in its application to subsequent contracts; for it has not, and I think it cannot, for a moment, be maintained, that a law which, in express terms, varies the construction of an existing contract, or which, repealing a former law, is made to produce the same effect, does not impair the obligation of that contract.

The statute of frauds, and the statute of limitations, which have been put as examples of the third and fourth classes of laws, are also admitted to be valid, because they merely concern the modes of proceeding in the trial of causes. The former, supplying a rule of evidence, and the latter, forming a part of the remedy given by the legislature to enforce the obligation, and likewise providing a rule of evidence.

All this I admit. But how does it happen that these laws, like those which affect the validity and construction of contracts, are valid as to subsequent, and yet void as to prior and subsisting contracts? For we are informed by the learned judge who delivered the opinion of this court, in the case of Sturges v. Crowninshield,

4 W., 122, that, "if, in a State where six years may be pleaded in bar to an action of assumpsit, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed within it, there could be little doubt of its unconstitutionality."

It is thus most apparent that, whichever way we turn, whether to laws affecting the validity, construction, or discharges of contracts, or the evidence or remedy to be employed in enforcing them, we are met by this overruling and admitted distinction, between those which operate retrospectively, and those which operate prospectively. In all of them the law is pronounced to be void in the first class of cases, and not so in the second.

Let us stop, then, to make a more critical examination of the act of limitations, which, although it concerns the remedy, or, if it must be conceded, the evidence, is yet void or otherwise, as it is made to apply retroactively, or prospectively, and see if it can, upon any intelligible principle, be distinguished from a bankrupt law, when applied in the same manner. What is the effect of the former? The answer is, to discharge the debtor and all his future acquisitions from this contract; because he is permitted to plead it in bar of any remedy which can be instituted against him, and consequently in bar or destruction of the obligation which his contract imposed upon him. What is the effect of a discharge under a bankrupt law? I can answer this question in no other terms than those which are given to the former question. If there be a difference, it is one which, in the eye of justice, at least, is more favorable to the validity of the latter than of the former; for in the one, the debtor surrenders everything which he possesses towards the discharge of his obligation, and in the other, he surrenders nothing, and sullenly shelters himself behind a legal objection with which the law has provided him, for the purpose of protecting his person, and his present as well as his future acquisitions, against the performance of his contract.

It is said that the former does not discharge him absolutely from his contract, because it leaves a shadow sufficiently substantial to raise a consideration for a new promise to pay. And is not this equally the case with a certificated bankrupt, who afterwards promises to pay a debt from which his certificate had discharged him? In the former case, it is said the defendant must plead the statute in order to bar the remedy and to exempt him from his obligation. And so, I answer, he must plead his discharge under the bankrupt law, and his conformity to it, in order to bar the remedy of his creditor, and to secure to himself a like exemption.

I have, in short, sought in vain for some other grounds on which to distinguish the two laws from each other than those which were suggested at the bar. I can imagine no other, and I confidently believe that none exist which will bear the test of a critical examination.

To the decision of this court, made in the case of Sturges v. Crowninshield, and to the reasoning of the learned judge who delivered that opinion, I entirely submit; although I did not then, nor can I now bring my mind to concur in that part of it which admits the constitutional power of the state legislatures to pass bankrupt laws, by which I understand those laws which discharge the person and the future acquisitions of the bankrupt from his debts. I have always thought that the power to pass such a law was exclusively vested by the constitution in the legislature of the United States. But it becomes me to believe that this opinion was and is incorrect, since it stands condemned by the decision of a majority of this court, solemnly pronounced.

After making this acknowledgment, I refer again to the above decision with some degree of confidence in support of the opinion, to which I am now inclined to come, that a bankrupt law which operates prospectively, or in so far as it does so operate, does not violate the constitution of the United States. It is there stated "that, until the power to pass uniform laws on the subject of bankruptcies be exercised by congress, the States are not forbidden to pass a bankrupt law, provided it contain no principle which violates the 10th section of the 1st article of the constitution of the United States." The question in that case was, whether the law of New York, passed on the 3d of April, 1811, which liberates not only the person of the debtor, but discharges him from all liability for any debt contracted previous as well as subsequent to his discharge, on his surrendering his property for the use of his creditors, was a valid law under the constitution, in its application to a debt contracted prior to its passage. The court decided that it was not, upon the single ground that it impaired the obligation of that contract. And if it be true that the States cannot pass a similar law to operate upon contracts subsequently entered into, it follows inevitably, either that they cannot pass such laws at all, contrary to the express declaration of the court, as before quoted, or that such laws do not impair the obligation of contracts subsequently entered into; in fine, it is a self-evident proposition that every contract that can be formed, must either precede or follow any law by which it may be affected.

I have, throughout the preceding part of this opinion, considered

the municipal law of the country where the contract is made as incorporated with the contract, whether it affects its validity, construction, or discharge. But I think it quite immaterial to stickle for this position, if it be conceded to me, what can scarcely be denied, that this municipal law constitutes the law of the contract so formed, and must govern it throughout. I hold the legal consequences to be the same in whichever view the law, as it affects the contract, is considered.

I come now to a more particular examination and construction of the section under which this question arises; and I am free to acknowledge that the collocation of the subjects for which it provides, has made an irresistible impression upon my mind, much stronger, I am persuaded, than I can find language to communicate to the minds of others.

It declares that "no State shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts." These prohibitions, associated with the powers granted to congress "to coin money, and to regulate the value thereof, and of foreign coins," most obviously constitute members of the same family, being upon the same subject and governed by the same policy.

This policy was to provide a fixed and uniform standard of value throughout the United States, by which the commercial and other dealings between the citizens thereof, or between them and foreigners, as well as the moneyed transactions of the government, should be regulated. For it might well be asked, why vest in congress the power to establish a uniform standard of value by the means pointed out, if the States might use the same means, and thus defeat the uniformity of the standard, and, consequently, the standard itself? And why establish a standard at all, for the government of the various contracts which might be entered into, if those contracts might afterwards be discharged by a different standard, or by that which is not money, under the authority of State tender laws? It is obvious, therefore, that these prohibitions, in the 10th section, are entirely homogeneous, and are essential to the establishment of a uniform standard of value, in the formation and discharge of contracts. It is for this reason, independent of the general phraseology which is employed, that the prohibition in regard to State tender laws will admit of no construction which would confine it to State laws which have a retrospective operation.

The next class of prohibitions contained in this section consists of bills of attainder, ex post facto laws, and laws impairing the obligation of contracts.

Here, too, we observe, as I think, members of the same family brought together in the most intimate connection with each other. The States are forbidden to pass any bill of attainder or ex post facto law, by which a man shall be punished criminally or penally, by loss of life, of his liberty, property, or reputation, for an act which, at the time of its commission, violated no existing law of the land. Why did the authors of the constitution turn their attention to this subject, which, at the first blush, would appear to be peculiarly fit to be left to the discretion of those who have the police and good government of the State under their management and control? The only answer to be given is, because laws of this character are oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man. The injustice and tyranny which characterizes ex post facto laws, consists altogether in their retrospective operation, which applies with equal force, although not exclusively, to bills of attainder.

But if it was deemed wise and proper to prohibit State legislation as to retrospective laws, which concern, almost exclusively, the citizens and inhabitants of the particular State in which this legislation takes place, how much more did it concern the private and political interests of the citizens of all the States, in their commercial and ordinary intercourse with each other, that the same prohibition should be extended civilly to the contracts which they might enter into?

If it were proper to prohibit a state legislature to pass a retrospective law, which should take from the pocket of one of its own citizens a single dollar as a punishment for an act which was innocent at the time it was committed; how much more proper was it to prohibit laws of the same character precisely, which might deprive the citizens of other States, and foreigners as well as citizens of the same State, of thousands, to which, by their contracts, they were justly entitled, and which they might possibly have realized but for such State interference? How natural, then, was it, under the influence of these considerations, to interdict similar legislation in regard to contracts, by providing that no State should pass laws impairing the obligation of past contracts? It is true that the first two of these prohibitions apply to laws of a criminal, and the last to laws of a civil character; but if I am correct in my view of the spirit and motives of these prohibitions, they agree in the principle which suggested them. They are founded upon the same reason, and the application of it is at least as strong to the last as it is to the first two prohibitions.

But these reasons are altogether inapplicable to laws of a pros-

pective character. There is nothing unjust or tyrannical in punishing offenses prohibited by law, and committed in violation of that law. Nor can it be unjust or oppressive, to declare by law that contracts subsequently entered into, may be discharged in a way different from that which the parties have provided, but which they know, or may know, are liable, under certain circumstances, to be discharged in a manner contrary to the provisions of their contract.

Thinking, as I have always done, that the power to pass bankrupt laws was intended by the authors of the constitution to be exclusive in congress, or, at least, that they expected the power vested in that body would be exercised, so as effectually to prevent its exercise by the States, it is the more probable that, in reference to all other interferences of the state legislatures upon the subject of contracts, retrospective laws were alone in the contemplation of the convention. . . .

But why, it has been asked, forbid the States to pass laws making anything but gold and silver coin a tender in payment of debts contracted subsequent as well as prior to the law which authorizes it; and yet confine the prohibition to pass laws impairing the obligation of contracts to past contracts, or, in other words, to future bankrupt laws, when the consequence resulting from each is the same, the latter being considered by the counsel as being, in truth, nothing less than tender laws in disguise.

An answer to this question has, in part, been anticipated by some of the preceding observations. The power to pass bankrupt laws having been vested in congress, either as an exclusive power, or under the belief that it would certainly be exercised; it is highly probable that state legislation upon that subject was not within the contemplation of the convention; or, if it was, it is quite unlikely that the exercise of the power, by the state legislatures, would have been prohibited by the use of terms which, I have endeavored to show, are inapplicable to laws intended to operate prospectively. For had the prohibition been to pass laws impairing contracts, instead of the obligation of contracts, I admit that it would have borne the construction which is contended for, since it is clear that the agreement of the parties in the first case would be impaired as much by a prior as it would be by a subsequent bankrupt law. It has, besides, been attempted to be shown that the limited restriction upon state legislation, imposed by the former prohibition, might be submitted to by the States, whilst the extensive operation of the latter would have hazarded, to say the least of it, the adoption of the constitution by the state conventions.

But an answer, still more satisfactory to my mind, is this: tender laws, of the description stated in this section, are always unjust; and, where there is an existing bankrupt law at the time the contract is made, they can seldom be useful to the honest debtor. They violate the agreement of the parties to it, without the semblance of an apology for the measure, since they operate to discharge the debtor from his undertaking, upon terms variant from those by which he bound himself, to the injury of the creditor, and unsupported, in many cases, by the plea of necessity. They extend relief to the opulent debtor, who does not stand in need of it; as well as to the one who is, by misfortunes, often unavoidable, reduced to poverty, and disabled from complying with his engagements. In relation to subsequent contracts, they are unjust when extended to the former class of debtors, and useless to the second, since they may be relieved by conforming to the requisitions of the state bankrupt law, where there is one. Being discharged by this law from all his antecedent debts, and having his future acquisitions secured to him, an opportunity is afforded him to become once more a useful member of society.

If this view of the subject be correct, it will be difficult to prove that a prospective bankrupt law resembles, in any of its features, a law which should make anything but gold and silver coin a tender in payment of debts.

I shall now conclude this opinion by repeating the acknowledgment which candor compelled me to make in its commencement, that the question which I have been examining is involved in difficulty and doubt. But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this court, when that subject has called for its decision; and I know that it expresses the honest sentiments of each and every member of this bench. I am perfectly satisfied that it is entertained by those of them from whom it is the misfortune of the majority of the court to differ on the present occasion, and that they feel no reasonable doubt of the correctness of the conclusion to which their best judgment has conducted them.

My opinion is, that the judgment of the court below ought to be reversed, and judgment given for the plaintiff in error. . . .

[JUSTICES JOHNSON, THOMPSON, and TRIMBLE delivered concurring opinions. CHIEF JUSTICE MARSHALL delivered a dissenting opinion, in which JUSTICES DUVALL and STORY concurred.]

Judgment having been entered in favor of the validity of a certificate of discharge under the state laws in those cases, argued in connection with Ogden v. Saunders, where the contract was made between citizens of the State under whose law the discharge was obtained, and in whose courts the certificate was pleaded, the cause was further argued by the same counsel, upon the points reserved, as to the effect of such a discharge in respect to a contract made with a citizen of another State, and where the certificate was pleaded in the courts of another State, or of the United States.

JOHNSON, J. I am instructed by the majority of the court finally to dispose of this cause. The present majority is not the same which determined the general question on the constitutionality of state insolvent laws, with reference to the violation of the obligation of contracts. I now stand united with the minority on the former question, and, therefore, feel it due to myself and the community to maintain my consistency.

The question now to be considered is, whether a discharge of a debtor under a state insolvent law, would be valid against a creditor or citizen of another State, who has never voluntarily subjected himself to the state laws, otherwise than by the origin of his contract.

As between its own citizens, whatever be the origin of the contract, there is now no question to be made on the effect of such a discharge; nor is it to be questioned, that a discharge not valid under the constitution in the courts of the United States, is equally invalid in the state courts. The question to be considered goes to the invalidity of the discharge altogether, and, therefore, steers clear of that provision in the constitution which purports to give validity in every State to the records, judicial proceedings, and so forth, of each State.

The question now to be considered, was anticipated in the case of Sturges v. Crowninshield, 4 W., 122, when the court, in the close of the opinion delivered, declared that it means to confine

its views to the case then under consideration, and not to commit itself as to those in which the interests and rights of a citizen of another State are implicated.

The question is one partly international, partly constitutional. My opinion on the subject is briefly this: that the provision in the constitution which gives the power to the general government to establish tribunals of its own in every State, in order that the citizens of other States or sovereignties might therein prosecute their rights under the jurisdiction of the United States, had for its object an harmonious distribution of justice throughout the Union; to confine the States, in the exercise of their judicial sovereignty, to cases between their own citizens; to prevent, in fact, the exercise of that very power over the rights of citizens of other States, which the origin of the contract might be supposed to give to each State; and thus, to obviate that *conflictus legum*, which has employed the pens of Huberus and various others, and which any one who studies the subject will plainly perceive it is infinitely more easy to prevent than to adjust.

These conflicts of power and right necessarily arise only after contracts are entered into. Contracts, then, become the appropriate subjects of judicial cognizance; and if the just claims which they give rise to, are violated by arbitrary laws, or if the course of distributive justice be turned aside, or obstructed by legislative interference, it becomes a subject of jealousy, irritation, and national complaint or retaliation.

It is not unimportant to observe, that the constitution was adopted at the very period when the courts of Great Britain were engaged in adjusting the conflicts of right which arose upon their own bankrupt law, among the subjects of that crown in the several dominions of Scotland, Ireland, and the West Indies. The first case we have on the effect of foreign discharges, that of Ballantine v. Golding, 1 Cooke's Bank. Law, 487, occurred in 1783, and the law could hardly be held settled before the case of Hunter v. Potts, 4 Term Rep., 182, which was decided in 1791.

Any one who will take the trouble to investigate the subject, will, I think, be satisfied, that although the British courts profess to decide upon a principle of universal law, when adjudicating upon the effect of a foreign discharge, neither the passage in Vattel, to which they constantly refer, nor the practice and doctrines of other nations, will sustain them in the principle to the extent in which they assert it. It was all-important to a great commercial nation, the creditors of all the rest of the world, to maintain the doctrine as one of universal obligation, that the assignment of the

bankrupt's effects, under a law of the country of the contract, should carry the interest in his debts, wherever his debtor may reside; and that no foreign discharge of his debtor should operate against debts contracted with the bankrupt in his own country. But I think it is perfectly clear that in the United States, a different doctrine has been established; and, since the power to discharge the bankrupt is asserted on the same principle with the power to assign his debts, that the departure from it in the one instance carries with it a negation of the principle altogether.

It is vain to deny that it is now the established doctrine in England, that the discharge of a bankrupt shall be effectual against contracts of the State that give the discharge, whatsoever be the allegiance or country of the creditor. But I think it equally clear, that this is a rule peculiar to her jurisprudence, and that reciprocity is the general rule of other countries; that the effect given to such discharge is so much a matter of comity, that the States of the European continent, in all cases, reserve the right of deciding whether reciprocity will not operate injuriously upon their own citizens.

Huberus, in his third axiom on this subject, puts the effect of such laws upon the ground of courtesy, and recognizes the reservation that I have mentioned; other writers do the same.

I will now examine the American decision on this subject; and, first, in direct hostility with the received doctrines of the British courts, it has been solemnly adjudged in this court, and, I believe, in every state court of the Union, that, notwithstanding the laws of bankruptcy in England, a creditor of the bankrupt may levy an attachment on a debt due the bankrupt in this country, and appropriate the proceeds to his own debt. . . . [Here follows a consideration of the cases of Harrison v. Sterry, 5 Cranch, 289; Baker v. Wheaton, 5 Mass., 509; Watson v. Bourne, 10 Mass., 337; Assignees of Topham v. Chapman, 1 Const. Rep. (S. C.), 283, and Phillips v. Hunter, 2 H. Black., 402.]

I think it, then, fully established, that in the United States a creditor of the foreign bankrupt may attach the debt due the foreign bankrupt, and apply the money to the satisfaction of his peculiar debt, to the prejudice of the rights of the assignees or other creditors.

I do not here speak of assignees, or rights created, under the bankrupt's own deed; those stand on a different ground, and do not affect this question. I confine myself to assignments, or transfers, resting on the operation of the laws of the country, independ-

ent of the bankrupt's deed; to the rights and liabilities of debtor, creditor, bankrupt, and assignees, as created by law.

What is the actual bearing of this right to attach, so generally recognized by our decisions?

It imports a general abandonment of the British principles; for, according to their laws, the assignee alone has the power to release the debtor. But the right to attach necessarily implies the right to release the debtor, and that right is here asserted under the laws of a State which is not the State of the contract.

So, also, the creditor of the bankrupt is, by the laws of his country, entitled to no more than a ratable participation in the bankrupt's effects. But the right to attach imports a right to exclusive satisfaction, if the effects so attached should prove adequate to make satisfaction.

The right to attach also imports the right to sue the bankrupt; and who would impute to the bankrupt law of another country, the power to restrain the citizens of these States in the exercise of their right to go into the tribunals of their own country for the recovery of debts, wherever they may have originated? Yet, universally, after the law takes the bankrupt into its own hands, his creditors are prohibited from suing.

Thus much for the law of this case in an international view. I will consider it with reference to the provisions of the constitution.

I have said above, that I had no doubt the erection of a distinct tribunal for the resort of citizens of other States, was introduced *ex industria,* into the constitution, to prevent, among other evils, the assertion of a power over the rights of the citizens of other States, upon the metaphysical ideas of the British courts on the subject of jurisdiction over contracts. And there was good reason for it; for, upon that principle it is, that a power is asserted over the rights of creditors which involves a mere mockery of justice.

Thus, in the case of Burrows v. Jamineau (reported in 2 Strange, and better reported in Moseley, 1, and some other books), the creditor, residing in England, was cited, probably, by a placard on a door-post in Leghorn, to appear there to answer to his debtor; and his debt passed upon by the court, perhaps, without his having ever heard of the institution of legal process to destroy it.

The Scotch, if I remember correctly, attach the summons on the flagstaff, or in the market-place, at the shore of Leith; and the civil law process by proclamation, or *viis et modis,* is not much better, as the means of subjecting the rights of foreign creditors to their tribunals.

All this mockery of justice, and the jealousies, recriminations,

and perhaps retaliations which might grow out of it are avoided, if the power of the States over contracts, after they become the subject exclusively of judicial cognizance, is limited to the controversies of their own citizens.

And it does appear to me almost incontrovertible, that the States cannot proceed one step further without exercising a power incompatible with the acknowledged powers of other States, or of the United States, and with the rights of the citizens of other States.

Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are to be affected, are entitled to a hearing. Hence every system, in common with the particular system now before us, professes to summon the creditors before some tribunal, to show cause against granting a discharge to the bankrupt.

But on what principle can a citizen of another State be forced into the courts of a State for this investigation? The judgment to be passed is to prostrate his rights; and on the subject of these rights the constitution exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract may originate. In the only tribunal to which he owes allegiance, the State insolvent or bankrupt laws cannot be carried into effect; they have a law of their own on the subject;[1] and a certificate of discharge under any other law would not be acknowledged as valid even in the courts of the State in which the court of the United States that grants it is held. Where is the reciprocity? Where the reason upon which the state courts can thus exercise a power over the suitors of that court, when that court possesses no such power over the suitors of the state courts?

In fact, the constitution takes away the only ground upon which this eminent dominion over particular contracts can be claimed, which is that of sovereignty. For the constitutional suitors in the courts of the United States are not only exempted from the necessity of resorting to the state tribunals, but actually cannot be forced into them. If, then, the law of the English courts had ever been practically adopted in this country in the state tribunals, the constitution has produced such a radical modification of state power over even their own contracts, in the hands of individuals not subject to their jurisdiction, as to furnish ground for excepting the rights of such individuals from the power which the States unquestionably possess over their own contracts, and their own citizens.

[1] 2 Stats. at Large.

Follow out the contrary doctrine in its consequences, and see the absurdity it will produce.

The constitution has constituted courts professedly independent of state power in their judicial course; and yet the judgments of those courts are to be vacated, and their prisoners set at large, under the power of the state courts, or of the state laws, without the possibility of protecting themselves from its exercise.

I cannot acquiesce in an incompatibility so obvious.

No one has ever imagined that a prisoner in confinement, under process from the courts of the United States, could avail himself of the insolvent laws of the State in which the court sits. And the reason is, that those laws are municipal and peculiar, and appertaining exclusively to the exercise of state power in that sphere in which it is sovereign, that is, between its own citizens, between suitors subjected to state power exclusively, in their controversies between themselves.

In the courts of the United States, no higher power is asserted than that of discharging the individual in confinement under its own process. This affects not to interfere with the rights of creditors in the state courts, against the same individual. Perfect reciprocity would seem to indicate that no greater power should be exercised under state authority over the rights of suitors who belong to the United States jurisdiction. Even although the principle asserted in the British courts, of supreme and exclusive power over their contracts, had obtained in the courts of the United States, I must think that power has undergone a radical modification by the judicial powers granted to the United States.

I, therefore, consider the discharge, under a state law, as incompetent to discharge a debt due a citizen of another State; and it follows that the plea of a discharge here set up, is insufficient to bar the rights of the plaintiff.

It becomes necessary, therefore, to consider the other errors assigned in behalf of the defendant; and, first, as to the plea of the act of limitations.

The statute pleaded here is not the act of Louisiana, but that of New York; and the question is not raised by the facts or averments, whether he could avail himself of that law if the full time had run out before his departure from New York, as was supposed in argument. The plea is obviously founded on the idea that the statute of the State of the contract was generally pleadable in any other State, a doctrine that will not bear argument.

The remaining error assigned has regard to the sum for which the judgment is entered, it being for a greater amount than the

nominal amount of the bills of exchange on which the suit was brought, and which are found by the verdict.

There has been a defect of explanation on this subject; but from the best information afforded us, we consider the amount for which judgment is entered, as made up of principal, interest, and damages, and the latter as being legally incident to the finding of the bills of exchange, and their non-payment, and assessed by the court under a local practice consonant with that by which the amount of written contracts is determined, by reference to the prothonotary, in many other of our courts. We, therefore, see no error in it. The judgment below will, therefore, be affirmed.

And the purport of this adjudication, as I understand it, is, that as between citizens of the same State, a discharge of a bankrupt by the laws of that State is valid as it affects posterior contracts; that as against creditors, citizens of other States, it is invalid as to all contracts.

The propositions which I have endeavored to maintain in the opinion which I have delivered are these:—

1. That the power given to the United States to pass bankrupt laws is not exclusive.

2. That the fair and ordinary exercise of that power by the States does not necessarily involve a violation of the obligation of contracts, *multi fortiori* of posterior contracts.

3. But when, in the exercise of that power, the States pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the constitution of the United States.

Mr. Justice Washington, Mr. Justice Thompson, and Mr. Justice Trimble dissented.

Mr. Chief Justice Marshall, Mr. Justice Duvall, and Mr. Justice Story, assented to the judgment, which was entered for the defendant in error. *Judgment affirmed.*

THE PROPRIETORS OF THE CHARLES RIVER BRIDGE v. THE PROPRIETORS OF THE WARREN BRIDGE ET AL.

11 Peters, 420. Decided 1837.

Error to the supreme judicial court of the commonwealth of Massachusetts. The material facts and the nature of the case appear in the opinion of the court. . . .

TANEY, C. J., delivered the opinion of the court.

The questions involved in this case are of the gravest character, and the court have given to them the most anxious and deliberate consideration. The value of the right claimed by the plaintiffs is large in amount; and many persons may no doubt be seriously affected in their pecuniary interests by any decisions which the court may pronounce; and the questions which have been raised as to the power of the several States, in relation to the corporations they have chartered, are pregnant with important consequences; not only to the individuals who are concerned in the corporate franchises, but to the communities in which they exist. The court are fully sensible that it is their duty, in exercising the high powers conferred on them by the constitution of the United States, to deal with these great and extensive interests with the utmost caution; guarding, as far as they have the power to do so, the rights of property, and at the same time carefully abstaining from any encroachment on the rights reserved to the States.

It appears, from the record, that in the year 1650, the legislature of Massachusetts granted to the president of Harvard College "the liberty and power" to dispose of the ferry from Charlestown to Boston, by lease or otherwise, in the behalf and for the behoof of the college; and that, under that grant, the college continued to hold and keep the ferry by its lessees or agents, and to receive the profits of it, until 1785. In the last-mentioned year, a petition was presented to the legislature, by Thomas Russell and others, stating the inconvenience of the transportation by ferries, over Charles River, and the public advantages that would result from a bridge; and praying to be incorporated for the purpose of erecting a bridge in the place where the ferry between Boston and Charlestown was then kept. Pursuant to this petition, the legislature, on the 9th of March, 1785, passed an act incorporating a

company, by the name of "The Proprietors of the Charles River Bridge," for the purposes mentioned in the petition. Under this charter the company were empowered to erect a bridge, in "the place where the ferry was then kept;" certain tolls were granted, and the charter was limited to forty years, from the first opening of the bridge for passengers; and from the time the toll commenced, until the expiration of this term, the company were to pay two hundred pounds, annually, to Harvard College; and at the expiration of the forty years the bridge was to be the property of the commonwealth; "saving (as the law expresses it), to the said college or university, a reasonable annual compensation, for the annual income of the ferry, which they might have received had not the said bridge been erected."

The bridge was accordingly built, and was opened for passengers on the 17th of June, 1786. In 1792, the charter was extended to seventy years, from the opening of the bridge; and at the expiration of that time it was to belong to the commonwealth. The corporation have regularly paid to the college the annual sum of two hundred pounds, and have performed all of the duties imposed on them by the terms of their charter.

In 1828, the legislature of Massachusetts incorporated a company by the name of "The Proprietors of the Warren Bridge," for the purpose of erecting another bridge over Charles River. This bridge is only sixteen rods, at its commencement, on the Charlestown side, from the commencement of the bridge of the plaintiffs; and they are about fifty rods apart at their termination on the Boston side. The travelers who pass over either bridge, proceed from Charlestown square, which receives the travel of many great public roads leading from the country; and the passengers and travellers who go to and from Boston used to pass over the Charles River Bridge, from and through this square, before the erection of the Warren Bridge.

The Warren Bridge, by the terms of its charter, was to be surrendered to the State, as soon as the expenses of the proprietors in building and supporting it should be reimbursed; but this period was not, in any event, to exceed six years from the time the company commenced receiving toll.

When the original bill in this case was filed, the Warren Bridge had not been built; and the bill was filed after the passage of the law, in order to obtain an injunction to prevent its erection, and for general relief. The bill, among other things, charged, as a ground for relief, that the act for the erection of the Warren Bridge impaired the obligation of the contract between the com-

monwealth and the proprietors of the Charles River Bridge; and was therefore repugnant to the constitution of the United States. Afterwards, a supplemental bill was filed, stating that the bridge had then been so far completed, that it had been opened for travel, and that divers persons had passed over, and thus avoided the payment of the toll, which would otherwise have been received by the plaintiffs. The answer to the supplemental bill admitted that the bridge had been so far completed that foot passengers could pass; but denied that any persons but the workmen and the superintendents had passed over with their consent. In this state of the pleadings, the cause came on for hearing in the supreme judicial court for the county of Suffolk, in the commonwealth of Massachusetts, at November term, 1829; and the court decided that the act incorporating the Warren Bridge did not impair the obligation of the contract with the proprietors of the Charles River Bridge, and dismissed the complainants' bill: and the case is brought here by writ of error from that decision. It is, however, proper to state, that it is understood that the state court was equally divided upon the question; and that the decree dismissing the bill upon the ground above stated, was pronounced by a majority of the court, for the purpose of enabling the complainants to bring the question for decision before this court.

In the argument here, it was admitted, that since the filing of the supplemental bill, a sufficient amount of toll had been received by the proprietors of the Warren Bridge to reimburse all their expenses, and that the bridge is now the property of the State, and has been made a free bridge; and that the value of the franchise granted to the proprietors of the Charles River Bridge has by this means been entirely destroyed.

If the complainants deemed these facts material, they ought to have been brought before the state court, by a supplemental bill; and this court, in pronouncing its judgment, cannot regularly notice them. But in the view which the court take of this subject, these additional circumstances would not in any degree influence their decision. And as they are conceded to be true, and the case has been argued on that ground, and the controversy has been for a long time depending, and all parties desire a final end of it; and as it is of importance to them, that the principles on which this court decide should not be misunderstood, the case will be treated in the opinion now delivered, as if these admitted facts were regularly before us.

A good deal of evidence has been offered to show the nature and extent of the ferry right granted to the college; and also to

show the rights claimed by the proprietors of the bridge at different times, by virtue of their charter; and the opinions entertained by committees of the legislature, and others, upon that subject. But as these circumstances do not affect the judgment of this court, it is unnecessary to recapitulate them.

The plaintiffs in error insist, mainly, upon two grounds: 1. That by virtue of the grant of 1650, Harvard College was entitled, in perpetuity, to the right of keeping a ferry between Charlestown and Boston; that this right was exclusive; and that the legislature had not the power to establish another ferry on the same line of travel, because it would infringe the rights of the college; and that these rights, upon the erection of the bridge in the place of the ferry, under the charter of 1785, were transferred to, and became vested in "the proprietors of the Charles River Bridge;" and that under, and by virtue of this transfer of the ferry right, the rights of the bridge company were as exclusive in that line of travel, as the rights of the ferry. 2. That independently of the ferry right, the acts of the legislature of Massachusetts of 1785 and 1792, by their true construction, necessarily implied that the legislature would not authorize another bridge, and especially a free one, by the side of this, and placed in the same line of travel, whereby the franchise granted to the "proprietors of the Charles River Bridge" should be rendered of no value; and the plaintiffs in error contend, that the grant of the ferry to the college, and of the charter to the proprietors of the bridge, are both contracts on the part of the State; and that the law authorizing the erection of the Warren Bridge in 1828 impairs the obligation of one or both of these contracts.

It is very clear, that in the form in which this case comes before us, being a writ of error to a state court, the plaintiffs, in claiming under either of these rights, must place themselves on the ground of contract, and cannot support themselves upon the principle that the law divests vested rights. It is well settled by the decisions of this court, that a state law may be retrospective in its character, and may divest vested rights, and yet not violate the constitution of the United States, unless it also impairs the obligation of a contract. In 2 Peters, 413, Satterlee v. Matthewson, this court, in speaking of the state law then before them, and interpreting the article in the constitution of the United States which forbids the States to pass laws impairing the obligation of contracts, uses the following language: "It (the state law) is said to be retrospective; be it so. But retrospective laws which do not impair the obligation of contracts, or partake of the character

of ex post facto laws, are not condemned or forbidden by any part of that instrument" (the constitution of the United States). And in another passage in the same case, the court say: "The objection, however, most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of this act was to divest rights which were vested by law in Satterlee. There is certainly no part of the constitution of the United States which applies to a state law of this description; nor are we aware of any decision of this, or of any circuit court, which has condemned such a law upon this ground, provided its effect be not to impair the obligation of a contract." The same principles were reaffirmed in this court, in the late case of Watson and others v. Mercer, decided in 1834, 8 Pet., 110: "As to the first point (say the court), it is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the States from passing retrospective laws generally, but only ex post facto laws."

After these solemn decisions of this court, it is apparent that the plaintiffs in error cannot sustain themselves here, either upon the ferry right, or the charter to the bridge, upon the ground that vested rights of property have been divested by the legislature. And whether they claim under the ferry right, or the charter to the bridge, they must show that the title which they claim, was acquired by contract, and that the terms of that contract have been violated by the charter to the Warren Bridge. In other words, they must show that the State had entered into a contract with them, or those under whom they claim, not to establish a free bridge at the place where the Warren Bridge is erected. Such, and such only, are the principles upon which the plaintiffs in error can claim relief in this case.

The nature and extent of the ferry right granted to Harvard College, in 1650, must depend upon the laws of Massachusetts; and the character and extent of this right has been elaborately discussed at the bar. But in the view which the court take of the case before them, it is not necessary to express any opinion on these questions. For assuming that the grant to Harvard College, and the charter to the bridge company, were both contracts, and that the ferry right was as extensive and exclusive as the plaintiffs contend for; still they cannot enlarge the privileges granted to the bridge, unless it can be shown, that the rights of Harvard College in this ferry have, by assignment, or in some other way,

been transferred to the proprietors of the Charles River Bridge, and still remain in existence, vested in them, to the same extent with that in which they were held and enjoyed by the college before the bridge was built. . . . [The court holds that this cannot be shown.]

It is however said, that the payment of the £200 a year to the college, as provided for in the law, gives to the proprietors of the bridge an equitable claim to be treated as the assignees of their interest; and by substitution, upon chancery principles, to be clothed with all their rights.

The answer to this argument is obvious. This annual sum was intended to be paid out of the proceeds of the tolls which the company were authorized to collect. The amount of the tolls, it must be assumed, was graduated with a view to this encumbrance, as well as to every other expenditure to which the company might be subjected, under the provisions of their charter. The tolls were to be collected from the public, and it was intended that the expense of the annuity to Harvard College should be borne by the public; and it is manifest that it was so borne, from the amount which it is admitted they received, until the Warren Bridge was erected. Their agreement, therefore, to pay that sum can give no equitable right to be regarded as the assignees of the college, and certainly can furnish no foundation for presuming a conveyance; and as the proprietors of the bridge are neither the legal nor equitable assignees of the college, it is not easy to perceive how the ferry franchise can be invoked in aid of their claims, if it were even still a subsisting privilege; and had not been resumed by the State, for the purpose of building a bridge in its place.

Neither can the extent of the pre-existing ferry right, whatever it may have been, have any influence upon the construction of the written charter for the bridge. It does not, by any means, follow, that because the legislative power in Massachusetts, in 1650, may have granted to a justly favored seminary of learning the exclusive right of ferry between Boston and Charlestown, they would, in 1785, give the same extensive privilege to another corporation, who were about to erect a bridge in the same place. The fact that such a right was granted to the college cannot, by any sound rule of construction, be used to extend the privileges of the bridge company beyond what the words of the charter naturally and legally import. Increased population longer experienced in legislation, the different character of the corporation which owned the ferry from that which owned the bridge, might well have induced a

change in the policy of the State in this respect; and as the franchise of the ferry, and that of the bridge, are different in their nature, and were each established by separate grants, which have no words to connect the privileges of the one with the privileges of the other, there is no rule of legal interpretation which would authorize the court to associate these grants together, and to infer that any privilege was intended to be given to the bridge company, merely because it had been confererd on the ferry. The charter to the bridge is a written instrument which must speak for itself, and be interpreted by its own terms.

This brings us to the act of the legislature of Massachusetts, of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge;" and it is here, and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the State, may be implied. The court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England and by the decisions of our own tribunals. In 2 Barn. & Adol., 793, in the case of the proprietors of the Stourbridge Canal v. Wheeley and others, the court say, "The canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction, in all such cases, is now fully established to be this; that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act." And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one as could well be imagined for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent, in transporting large quantities of coal. The rights of all persons to navigate the canal were expressly secured by the act of parliament; so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet,

as they only used one of the levels of the canal, and did not pass through the locks; and the statute, in giving the right to exact toll, had given it for articles which passed "through any one or more of the locks," and had said nothing as to toll for navigating one of the levels; the court held that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant; if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still the right to exact toll could not be implied, because such a privilege was not found in the charter.

Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation a rule of construction differing from that of the English law, and, by implication, make the terms of a charter in one of the States, more unfavorable to the public, than upon an act of parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle, and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavorably to the public, and to the rights of the community, than would be done in a like case in an English court of justice.

But we are not now left to determine, for the first time, the rules by which public grants are to be construed in this country. The subject has already been considered in this court; and the rule of construction, above stated, fully established. [Here follow

citations to U. S. v. Arredondo, 6 Pet., 738; Jackson v. Lamphire, 3 Pet., 289; and Beaty v. The Lessee of Knowles, 4 Pet., 168.]

But the case most analogous to this, and in which the question came more directly before the court, is the case of the Providence Bank v. Billings and Pittman, 4 Pet., 514, and which was decided in 1830. In that case, it appeared that the legislature of Rhode Island had chartered the bank, in the usual form of such acts of incorporation. The charter contained no stipulation on the part of the State, that it would not impose a tax on the bank, nor any reservation of the right to do so. It was silent on this point. Afterwards, a law was passed, imposing a tax on all banks in the State; and the right to impose this tax was resisted by the Providence Bank, upon the ground that, if the State could impose a tax, it might tax so heavily as to render the franchise of no value, and destroy the institution; that the charter was a contract, and that a power which may in effect destroy the charter is inconsistent with it, and is impliedly renounced by granting it. But the court said that the taxing power was of vital importance, and essential to the existence of government; and that the relinquishment of such a power is never to be assumed. And in delivering the opinion of the court, the late chief justice states the principle, in the following clear and emphatic language. Speaking of the taxing power, he says, "as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear." The case now before the court is, in principle, precisely the same. It is a charter from a State. The act of incorporation is silent in relation to the contested power. The argument in favor of the proprietors of the Charles River Bridge is the same, almost in words, with that used by the Providence Bank; that is, that the power claimed by the State, if it exists, may be so used as to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer; and the fact that the power has been already exercised so as to destroy the value of the franchise, cannot in any degree affect the principle. The existence of the power does not, and cannot, depend upon the circumstance of its having been exercised or not.

It may, perhaps, be said that in the case of the Providence Bank, this court were speaking of the taxing power; which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness

and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade; and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges, that a State has surrendered, for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court above quoted, "that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the people of the State would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll, and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation.

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785 to the proprietors of the Charles River Bridge. This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge; and

establishes certain rates of toll, which the company are authorized to take. This is the whole grant. There is no exclusive privilege given to them over the waters of Charles River above or below their bridge. No right to erect another bridge themselves, nor to prevent other persons from erecting one. No engagement from the State that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent; and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them, it must be implied, simply from the nature of the grant, and cannot be inferred from the words by which the grant is made.

The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it or from it less convenient. None of the faculties or franchises granted to that corporation have been revoked by the legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it remain unimpaired. But its income is destroyed by the Warren Bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren Bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order then to entitle themselves to relief, it is necessary to show that the legislature contracted not to do the act of which they complain; and that they impaired or, in other words, violated that contract by the erection of the Warren Bridge.

The inquiry then is, does the charter contain such a contract on the part of the State? Is there any such stipulation to be found in that instrument? It must be admitted on all hands, that there is none,—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no

rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied; and the same answer must be given to them that was given by this court to the Providence Bank. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity by providing safe, convenient, and cheap ways for the transportation of produce and the purposes of travel, shall not be construed to have been surrendered or diminished by the State, unless it shall appear by plain words that it was intended to be done.

But the case before the court is even still stronger against any such implied contract as the plaintiffs in error contend for. The Charles River Bridge was completed in 1786. The time limited for the duration of the corporation by their original charter expired in 1826. When, therefore, the law passed authorizing the erection of the Warren Bridge, the proprietors of Charles River Bridge held their corporate existence under the law of 1792, which extended their charter for thirty years; and the rights, privileges, and franchises of the company must depend upon the construction of the last-mentioned law, taken in connection with the act of 1785.

The act of 1792, which extends the charter of this bridge, incorporates another company to build a bridge over Charles River; furnishing another communication with Boston, and distant only between one and two miles from the old bridge.

The first six sections of this act incorporate the proprietors of the West Boston Bridge, and define the privileges, and describe the duties, of that corporation. In the 7th section there is the following recital: "And whereas the erection of Charles River Bridge was a work of hazard and public utility, and another bridge in the place of West Boston Bridge may diminish the emoluments of Charles River Bridge; therefore, for the encouragement of enterprise," they proceed to extend the charter of the Charles River Bridge, and to continue it for the term of seventy years from the day the bridge was completed; subject to the conditions prescribed in the original act, and to be entitled to the same tolls. It appears, then, that by the same act that extended this charter, the legislature established another bridge, which they knew would lessen its profits; and this, too, before the expiration of the first charter.

and only seven years after it was granted; thereby showing that the State did not suppose that, by the terms it had used in the first law, it had deprived itself of the power of making such public improvements as might impair the profits of the Charles River Bridge; and from the language used in the clauses of the law by which the charter is extended, it would seem, that the legislature were especially careful to exclude any inference that the extension was made upon the ground of compromise with the bridge company, or as a compensation for rights impaired.

On the contrary, words are cautiously employed to exclude that conclusion; and the extension is declared to be granted as a reward for the hazard they had run, and "for the encouragement of enterprise." The extension was given because the company had undertaken and executed a work of doubtful success; and the improvements which the legislature then contemplated, might diminish the emoluments they had expected to receive from it. It results from this statement, that the legislature, in the very law extending the charter, asserts its rights to authorize improvements over Charles River which would take off a portion of the travel from this bridge and diminish its profits; and the bridge company accept the renewal thus given, and thus carefully connected with this assertion of the right on the part of the State. Can they, when holding their corporate existence under this law, and deriving their franchises altogether from it, add to the privileges expressed in their charter an implied agreement, which is in direct conflict with a portion of the law from which they derive their corporate existence? Can the legislature be presumed to have taken upon themselves an implied obligation, contrary to its own acts and declarations contained in the same law? It would be difficult to find a case justifying such an implication, even between individuals; still less will it be found where sovereign rights are concerned, and where the interests of a whole community would be deeply affected by such an implication. It would, indeed, be a strong exertion of judicial power, acting upon its own views of what justice required, and the parties ought to have done, to raise, by a sort of judicial coercion, an implied contract, and infer it from the nature of the very instrument in which the legislature appear to have taken pains to use words which disavow and repudiate any intention, on the part of the State, to make such a contract.

Indeed, the practice and usage of almost every State in the Union, old enough to have commenced the work of internal im-

provement, is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession, on the same line of travel; the latter one interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and traveling. In some cases, railroads have rendered the turnpike roads on the same line of travel so entirely useless, that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporations supposed that their privileges were invaded, or any contract violated on the part of the State. Amid the multitude of cases which have occurred, and have been daily occurring for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this court called upon to infer it from an ordinary act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, when there must have been so many occasions to give rise to it, proves that neither States, nor individuals, nor corporations, ever imagined that such a contract could be implied from such charters. It shows that the men who voted for these laws never imagined that they were forming such a contract; and if we maintain that they have made it, we must create it by a legal fiction, in opposition to the truth of the fact, and the obvious intention of the party. We cannot deal thus with the rights reserved to the States, and by legal intendments and mere technical reasoning take away from them any portion of that power over their own internal police and improvement which is so necessary to their well-being and prosperity.

And what would be the fruits of this doctrine of implied contracts on the part of the States, and of property in a line of travel by a corporation, if it should now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it, in the various acts which have been passed, within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach without invading its rights in the privileged line? If this court should establish the principles now contended

for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling, and you will soon find the old turnpike corporations awakening from their sleep and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals upon lines of travel which had been before occupied by turnpike corporations will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns, and are prepared to decide that when a turnpike road from one town to another had been made, no railroad or canal, between these two points, could afterwards be established. This court are not prepared to sanction principles which must lead to such results.

Many other questions of the deepest importance have been raised and elaborately discussed in the argument. It is not necessary, for the decision of this case, to express our opinion upon them; and the court deem it proper to avoid volunteering an opinion on any question involving the construction of the constitution, where the case itself does not bring the question directly before them, and make it their duty to decide upon it.

Some questions, also, of a purely technical character have been made and argued as to the form of proceeding and the right to relief. But enough appears on the record to bring out the great question in contest; and it is the interest of all parties concerned that the real controversy should be settled without further delay; and as the opinion of the court is pronounced on the main question in dispute here, and disposes of the whole case, it is altogether

unnecessary to enter upon the examination of the forms of proceeding in which the parties have brought it before the court.

The judgment of the supreme judicial court of the commonwealth of Massachusetts, dismissing the plaintiffs' bill, must, therefore, be affirmed, with costs.

[MR. JUSTICE MCLEAN delivered an opinion in which he argued that the case should be dismissed for want of jurisdiction. MR. JUSTICE STORY delivered a dissenting opinion, in which MR. JUSTICE THOMPSON concurred.]

XI. CIVIL AND POLITICAL RIGHTS.

BARRON, Etc., v. MAYOR, Etc., of BALTIMORE.

7 Peters, 243. Decided 1833.

Error to the court of appeals of the western shore of the State of Maryland.

Case by the plaintiff in error against the city of Baltimore, to recover damages for injuries to the wharf-property of the plaintiff, arising from the acts of the corporation

The city, in the asserted exercise of its corporate authority over the harbor, the paving of streets, and regulating grades for paving, and over the health of Baltimore, diverted from their accustomed and natural course, certain streams of water, which flow from the range of hills bordering the city, and diverted them, so that they made deposits of sand and gravel near the plaintiff's wharf, and thereby rendered the water shallow, and prevented the access of vessels. The decision of Baltimore county court was against the defendants, and a verdict for $4,500 was rendered for the plaintiff. The court of appeals reversed the judgment of Baltimore county court, and did not remand the case to that court for a further trial. From this judgment the defendant in the court of appeals prosecuted a writ of error to this court. . . .

Marshall, C. J., delivered the opinion of the court.

The judgment brought up by this writ of error having been rendered by the court of a State, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the 25th section of the Judicial Act.[1]

The plaintiff in error contends that it comes within that clause in the fifth amendment to the constitution, which inhibits the taking of private property for public use, without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. If this

[1] 1 Stats. at Large, 85.

proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the States. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the constitution was intended to secure the people of the several States against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the 10th section of the 1st article.

We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to congress; others are expressed in general terms. The third clause, for example, declares that "no bill of attainder or ex post facto law shall be passed." No language can be more general; yet the demonstration is complete that

it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain state legislation, contains in terms the very prohibition. It declares that "no State shall pass any bill of attainder or ex post facto law." This provision, then, of the 9th section, however comprehensive its language, contains no restriction on state legislation.

The 9th section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the 10th proceeds to enumerate those which were to operate on the state legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No State shall enter into any treaty," etc. Perceiving that in a constitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the state government, unless expressed in terms; the restrictions contained in the 10th section are in direct words so applied to the States.

It is worthy of remark, too, that these inhibitions generally restrain state legislation on subjects intrusted to the general government, or in which the people of all the States feel an interest.

A State is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution. To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to congress. To coin money is also the exercise of a power conferred on congress. It would be tedious to recapitulate the several limitations on the powers of the States which are contained in this section. They will be found, generally, to restrain state legislation on subjects intrusted to the government of the Union, in which the citizens of all the States are interested. In these alone were the whole people concerned. The question of their application to States is not left to construction. It is averred in positive words.

If the original constitution, in the 9th and 10th sections of the 1st article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the States; if in every inhibition in-

tended to act on state power, words are employed which directly express that intent,—some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two thirds of congress, and the assent of three fourths of their sister States, could never have occurred to any human being as a mode of doing that which might be effected by the State itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments.

In compliance with a sentiment thus generally expressed to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the States. These amendments contain no expression indicating an intention

to apply them to the state governments. This court cannot so apply them.

We are of opinion that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the States. We are therefore of opinion, that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that State, and the constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.

DRED SCOTT, PLAINTIFF IN ERROR, v. JOHN F. A. SANDFORD.

19 Howard, 393. Decided 1857.

This case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri. . . . [In 1834, Dred Scott, a negro slave belonging to Dr. Emerson, a surgeon in the United States army, was taken by his master from Missouri to Rock Island, Illinois, where slavery was prohibited by statute. Thence he was taken, in 1836, to Fort Snelling, in the territory of upper Louisiana. This post was situated on the west bank of the Mississippi, north of latitude 36° 30′, and north of Missouri, and hence within the territory in which slavery had been forbidden by the Missouri Compromise. In 1836, with the consent of their master, Dred and Harriet were married. In 1838, Dr. Emerson returned with his slaves to Missouri. In 1847, Dred brought suit in the Missouri circuit court to recover his freedom, having discovered that according to previous decisions of Missouri courts, residence in free territory conferred freedom. Judgment was rendered in his favor, but was reversed by the Missouri supreme court. Before the commencement of the present suit, Dred and his wife and two children were sold to Sandford, a citizen of New York. Scott having brought suit in trespass for assault and battery against Sandford in the Federal Circuit Court of Missouri, Sandford pleaded to the jurisdiction of the court that this could not be a suit between citizens of different States, because

Scott was not a citizen of Missouri, but "a negro of pure African descent; his ancestors were of pure African blood and were brought into this country and sold as negro slaves." To this Scott demurred and the demurrer was sustained. The defendant then pleaded in bar to the action that the plaintiff was his negro slave, and that he had only gently laid hands on him to restrain him, as he had a right to do. The judge instructed the jury that, "upon the facts in this case, the law is with the defendant." The plaintiff excepted to this instruction, and upon his exceptions the case was taken to the United States Supreme Court. There the case was twice argued,—first at December term, 1855, and again at December term, 1856; judgment was deferred until March 6, 1857, in order, says Alexander Johnston, "to avoid any increase of the excitement already attending the presidential election."]

Mr. Chief Justice Taney delivered the opinion of the court.

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There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And

2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant, in the State of Missouri; and he brought this action in the Circuit Court of the United States for that district, to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdiction; that he and the defendant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court overruled the plea, and gave judgment that the defendant should answer over. And he thereupon put in sundry pleas in bar, upon which issues were joined; and at the trial the verdict and judgment were in his favor. Whereupon the plaintiff brought this writ of error.

Before we speak of the pleas in bar, it will be proper to dispose of the questions which have arisen on the plea in abatement.

That plea denies the right of the plaintiff to sue in a court of the United States, for the reasons therein stated. . . . It is suggested, however, that this plea is not before us. . . . We think they [the plea and the judgment of the court upon it] are before us . . . and it becomes, therefore, our duty to decide whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States. . . .

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, privileges and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution. . . . And this being the only matter in dispute on the pleadings, this court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country and sold as slaves. . . .

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea of abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them. . . .

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterward be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endow him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised then to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards, by birthright or otherwise, become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were

recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument. . . .

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . .

The legislation of the different colonies furnishes positive and indisputable proof of this fact. . . . The language of the Declaration of Independence is equally conclusive. . . . This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language. . . . But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper. . . . And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. . . .

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen States by which that instrument was framed; and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep

and enduring marks of inferiority and degradation; or, that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slave-holding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State. . . .

To all this mass of proof we have still to add, that Congress has repeatedly legislated upon the same construction of the Constitution that we have given. Three laws, two of which were passed almost immediately after the Government went into operation, will be abundantly sufficient to show this. . . .

The first of these acts is the naturalization law, which was passed at the second session of the first Congress, March 26, 1790, and confines the right of becoming citizens "to aliens being free white persons." . . .

Another of the early laws of which we have spoken, is the first militia law, which was passed in 1792, at the first session of the

second Congress. . . . It directs that every "free able-bodied white male citizen" shall be enrolled in the militia. . . .

The third act to which we have alluded is still more decisive; it was passed as late as 1813 (2 Stat., 809), and it provides: "That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ, on board of any public or private vessels of the United States, any person or persons except citizens of the United States, or persons of color, natives of the United States." . . .

The conduct of the Executive Department of the Government has been in perfect harmony upon this subject with this course of legislation. The question was brought officially before the late William Wirt, when he was the Attorney General of the United States, in 1821, and he decided that the words "citizens of the United States" were used in the acts of Congress in the same sense as in the Constitution; and that free persons of color were not citizens, within the meaning of the Constitution and laws; and this opinion has been confirmed by that of the late Attorney General, Caleb Cushing, in a recent case, and acted upon by the Secretary of State, who refused to grant passports to them as "citizens of the United States."

But it is said that a person may be a citizen, and entitled to that character, although he does not possess all the rights which may belong to other citizens; as, for example, the right to vote, or to hold particular offices; and that yet, when he goes into another State, he is entitled to be recognized there as a citizen, although the State may measure his rights by the rights which it allows to persons of a like character or class resident in the State, and refuse to him the full rights of citizenship.

This argument overlooks the language of the provision in the Constitution of which we are speaking.

Undoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold office, yet they are citizens.

So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union foreigners not naturalized are allowed to vote.

And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the Constitution giving privileges and immunities in other States, does not apply to them.

Neither does it apply to a person who, being the citizen of a State, migrates to another State. For then he becomes subject to the laws of the State in which he lives, and he is no longer a citizen of the State from which he removed. And the State in which he resides may then, unquestionably, determine his status or condition, and place him among the class of persons who are not recognized as citizens, but belong to an inferior and subject race; and may deny him the privileges and immunities enjoyed by its citizens.

But so far as mere rights of person are concerned, the provision in question is confined to citizens of a State who are temporarily in another State without taking up their residence there. It gives them no political rights in the State as to voting or holding office, or in any other respect. For a citizen of one State has no right to participate in the government of another. But if he ranks as a citizen in the State to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another State, the Constitution clothes him, as to the rights of person, with all the privileges and immunities which belong to citizens of the State. And if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding. And if the States could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation; and would give no rights to the citizen when in another State. He would have none but what the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guaranties rights to the citizen, and the State cannot withhold them. And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the

Constitution when these privileges and immunities were provided for the protection of the citizens in other States. . . .

What the construction [of the Constitution] was at that time [when it was framed], we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since, the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word "citizen" and the word "people."

And upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous. . . . [Here follows a discussion of the judicial authority of the court to examine any question in the case other than that of the jurisdiction of the Circuit Court. The court determines that it has the requisite authority].

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom. . . .

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

We proceed to examine the first question.

The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law, under any of the powers granted to it by the Constitution; for if the authority is not given

by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the States.

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" but, in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more. . . . It was intended for a specific purpose, to provide for the things we have mentioned. It was to transfer to the new Government the property then held in common by the States, and to give to that Government power to apply it to the objects for which it had been destined by mutual agreement among the States before their league was dissolved. It applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire. . . .

At the time when the territory in question was obtained by cession from France, it contained no population fit to be associated together and admitted as a State; and it therefore was absolutely necessary to hold possession of it, as a Territory belonging to the United States, until it was settled and inhabited by a civilized community capable of self-government, and in a condition to be admitted on equal terms with the other States as a member of the Union. But, as we have before said, it was acquired by the General Government, as the representative and trustee of the people of the United States, and it must therefore be held in that character for their common and equal benefit; for it was the people of the several States, acting through their agent and representative, the Federal Government, who in fact acquired the Territory in question, and the Government holds it for their common use until it shall be associated with the other States as a member of the Union.

But until that time arrives, it is undoubtedly necessary that some Government should be established, in order to organize society, and to protect the inhabitants in their persons and property;

and as the people of the United States could act in this matter only through the Government which represented them, and through which they spoke and acted when the Territory was obtained, it was not only within the scope of its powers, but it was its duty to pass such laws and establish such a Government as would enable those by whose authority they acted to reap the advantages anticipated from its acquisition, and to gather there a population which would enable it to assume the position to which it was destined among the States of the Union. . . . But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. . . . Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law. . . .

It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument.

But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other. The powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers, and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights

they have reserved. And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding or owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident. . . .

But there is another point in the case which depends upon State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri.

Our notice of this part of the case will be very brief; for the principle on which it depends was decided in this court, upon much consideration, in the case of Strader et al. v. Graham, reported in 10th Howard, 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner,

and afterwards brought back to Kentucky. And this court held that their status or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this court had no jurisdiction to revise the judgment of a State court upon its own laws. . . .

So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his status, as free or slave, depended on the laws of Missouri, and not of Illinois.

It has, however, been urged in the argument, that by the laws of Missouri he was free on his return, and that this case, therefore, cannot be governed by the case of Strader et al. v. Graham, where it appeared, by the laws of Kentucky, that the plaintiffs continued to be slaves on their return from Ohio. But whatever doubts or opinions may, at one time, have been entertained upon this subject, we are satisfied, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State, that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave, and not a citizen. . . .

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us, that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction.

Mr. Justice Nelson. . . . In the view we have taken of the case, it will not be necessary to pass upon this question [as to whether the plea in abatement is before the court], and we shall therefore proceed at once to an examination of the case upon its merits. The question upon the merits, in general terms, is, whether or not the removal of the plaintiff, who was a slave, with his master, from the State of Missouri to the State of Illinois, with a view to a temporary residence, and after such residence and return to the slave State, such residence in the free State works an emancipation.

As appears from the agreed statement of facts, this question has been before the highest court of the State of Missouri, and a judgment rendered that this residence in the free State has no such effect; but, on the contrary, that his original condition continued unchanged.

The court below, the Circuit Court of the United States for Missouri, in which this suit was afterwards brought, followed the decision of the State court, and rendered a like judgment against the plaintiff.

The argument against these decisions is, that the laws of Illinois, forbidding slavery within her territory, had the effect to set the slave free while residing in that State, and to impress upon him the condition and status of a freeman; and that, by force of these laws, this status and condition accompanied him on his return to the slave State, and of consequence he could not be there held as a slave.

This question has been examined in the courts of several of the slave-holding States, and different opinions expressed and conclusions arrived at. . . . Our opinion is, that the question is one which belongs to each State to decide for itself, either by its Legislature or courts of justice; and hence, in respect to the case before us, to the State of Missouri—a question exclusively of Missouri law, and which, when determined by that State, it is the duty of the Federal courts to follow it. In other words, except in cases where the power is restrained by the Constitution of the United States, the law of the State is supreme over the subject of slavery within its jurisdiction.

As a practical illustration of the principle, we may refer to the legislation of the free States in abolishing slavery, and prohibiting its introduction into their territories. Confessedly, except as restrained by the Federal Constitution, they exercised, and rightfully, complete and absolute power over the subject. Upon what principle, then, can it be denied to the State of Missouri? The power flows from the sovereign character of the States of this Union; sovereign, not merely as respects the Federal Government —except as they have consented to its limitation—but sovereign as respects each other. Whether, therefore, the State of Missouri will recognize or give effect to the laws of Illinois within her territories on the subject of slavery, is a question for her to determine. Nor is there any constitutional power in this Government that can rightfully control her.

Every State or nation possesses an exclusive sovereignty and

jurisdiction within her own territory; and her laws affect and bind all property and persons residing within it. It may regulate the manner and circumstances under which property is held, and the condition, capacity, and state of all persons therein; and, also, the remedy and modes of administering justice. And it is equally true, that no State or nation can affect or bind property out of its territory, or persons not residing within it. No State, therefore, can enact laws to operate beyond its own dominions, and, if it attempts to do so, it may be lawfully refused obedience. Such laws can have no inherent authority extra-territorially. This is the necessary result of distinct and separate sovereignties. . . .

These principles fully establish, that it belongs to the sovereign State of Missouri to determine by her laws the question of slavery within her jurisdiction, subject only to such limitations as may be found in the Federal Constitution; and, further, that the laws of other States of the Confederacy, whether enacted by their Legislatures or expounded by their courts, can have no operation within her territory, or affect rights growing out of her own laws on the subject. This is the necessary result of the independent and sovereign character of the State. The principle is not peculiar to the State of Missouri, but is equally applicable to each State belonging to the Confederacy. The laws of each have no extra-territorial operation within the jurisdiction of another, except such as may be voluntarily conceded by her laws or courts of justice. To the extent of such concession upon the rule of comity of nations, the foreign law may operate, as it then becomes a part of the municipal law of the State. When determined that the foreign law shall have effect, the municipal law of the State retires, and gives place to the foreign law. . . .

It has been supposed, in the argument on the part of the plaintiff, that the eighth section of the act of Congress passed March 6, 1820 (3 St. at Large, p. 544), which prohibited slavery north of thirty-six degrees thirty minutes, within which the plaintiff and his wife temporarily resided at Fort Snelling, possessed some superior virtue and effect, extra-territorially, and within the State of Missouri, beyond that of the laws of Illinois, or those of Ohio in the case of Strader et al. v. Graham. A similar ground was taken and urged upon the court in the case just mentioned, under the ordinance of 1787, which was enacted during the time of the Confederation, and re-enacted by Congress after the adoption of the Constitution, with some amendments adapting it to the new Government. (1 St. at Large, p. 50).

In answer to this ground, the Chief Justice, in delivering the opinion of the court, observed: "The argument assumes that the six articles which that ordinance declares to be perpetual, are still in force in the States since formed within the territory, and admitted into the Union. If this proposition could be maintained, it would not alter the question; for the regulations of Congress, under the old Confederation or the present Constitution, for the government of a particular Territory, could have no force beyond its limits. It certainly could not restrict the power of the States, within their respective territories, nor in any manner interfere with their laws and institutions, nor give this court control over them.

"The ordinance in question," he observes, "if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that State."

This view, thus authoritatively declared, furnishes a conclusive answer to the distinction attempted to be set up between the extra-territorial effect of a State law and the act of Congress in question.

It must be admitted that Congress possesses no power to regulate or abolish slavery within the States; and that, if this act had attempted any such legislation, it would have been a nullity. And yet the argument here, if there be any force in it, leads to the result, that effect may be given to such legislation; for it is only by giving the act of Congress operation within the State of Missouri, that it can have any effect upon the question between the parties. Having no such effect directly, it will be difficult to maintain, upon any consistent reasoning, that it can be made to operate indirectly upon the subject. . . .

It is perhaps not unfit to notice, in this connection, that many of the most eminent statesmen and jurists of the country entertain the opinion that this provision of the act of Congress, even within the territory to which it relates, was not authorized by any power under the Constitution. . . .

Upon the whole, it must be admitted that the current of authority, both in England and in this country, is in accordance with the law as declared by the courts of Missouri in the case before us, and we think the court below was not only right, but bound to follow it. . . .

Our conclusion is, that the judgment of the court below should be affirmed.

[Justices Wayne and Daniel concurred entirely in the opinion

of the Chief Justice. Justice Grier concurred with Justice Nelson "on the questions discussed by him." He did not mention the plea in abatement. Justice Campbell did not consider the plea in abatement, but concurred with the Chief Justice as to the other points involved. Justice Catron concurred with the Chief Justice as to the Missouri Compromise and with Justice Nelson as to the effect of residence in Illinois. He held that the plea in abatement was not before the court. Of the two dissenting justices, McLean denied and Curtis admitted that the plea in abatement was open.

Mr. Justice McLean and Mr. Justice Curtis dissented.

Justice McLean held, 1. As to the locality of slavery, that it was a mere municipal regulation, founded upon and limited to the range of territorial laws. 2. Slavery is emphatically a State institution. In the formation of the Federal Constitution, care was taken to confer no power on the Federal Government to interfere with this institution in the States. In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution. 3. As to the power of Congress to establish Territorial Governments, and to prohibit the introduction of slavery therein, Congress has power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. If Congress should deem slaves or free colored persons injurious to the population of a free Territory, on any ground connected with the public interest, they have the power to prohibit them from becoming settlers in it. 4. As to the effect of taking slaves into a State or Territory, and so holding them, where slavery is prohibited, how can the slave be coerced to serve in a State or Territory, not only without the authority of law, but against its express provisions? Where no slavery exists, the presumption, without regard to color, is in favor of freedom. In 1824, in the case of Winny v. Whitesides (1 Missouri Rep., 473), the Missouri Supreme Court held that if a slave be detained in Illinois until he be entitled to freedom, the right of the owner does not revive when he finds the negro in a slave State. 5. As to whether the status of slavery attached to the plaintiff and wife, on their return to Missouri, this doctrine is not asserted in the late opinion of the Supreme Court of Missouri, and up to 1852 the contrary doctrine was uniformly maintained by that court.

JUSTICE CURTIS held that the plea in abatement was before the court. To determine whether any person of African descent whose ancestors were sold as slaves in the United States can be a citizen of the United States, it may be inquired who were citizens of the United States at the time of the adoption of the Constitution. Citizens at that time can have been no other than the citizens of the United States under the Confederation. These included free persons descended from Africans held in slavery. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens. He concluded therefore, 1. That the free-born citizens of each State are citizens of the United States. 2. That as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States. 3. That every such citizen, residing in any State, has the right to sue and is liable to be sued in the Federal courts, as a citizen of that State in which he resides. 4. That as the plea to the jurisdiction in this case shows no facts, except that the plaintiff was of African descent, and his ancestors were sold as slaves, and as these facts are not inconsistent with his citizenship of the United States, and his residence in the State of Missouri, the plea to the jurisdiction was bad, and the judgment of the Circuit Court overruling it, was correct. As to the effect of Scott's residence in the Territory in which slavery was prohibited, the judge held that the laws of the United States in operation there changed his status to that of a free man. Furthermore the consent of the master that his slave, residing in a country which does not tolerate slavery, may enter into a lawful contract of marriage, attended with the civil rights and duties which belong to that condition, is an effectual act of emancipation. The Act of Congress of March 6, 1820, was a regulation respecting the territory of the United States, and was a constitutional and valid law.]

NOTE.—The court consisted at this time of nine judges, seven of whom concurred in the judgment rendered. Of these seven, only three, viz., Taney, Wayne and Daniel, held that the plea in abatement was open, and hence that the question of the status of free negroes was before the court. Justice Catron held that the

plea was not open. Justices Nelson and Campbell took such views of the case that they did not pass upon it, and Justice Grier seemed to avoid the question. Six members of the court, viz., Taney, Wayne, Daniel, Grier, Campbell, and Catron, concurred in pronouncing the Missouri Compromise unconstitutional. Justice Nelson did not pass upon it.

It is important in this case to distinguish the opinion of the court from the judgment of the court. What is called in the report the opinion of the court is in reality only the opinion of the Chief Justice, which he delivered before announcing the judgment of the court. The distinction appears clearly in the opinions of Justices Campbell and Catron, who concurred in the judgment of the Chief Justice, but expressly dissented from certain parts of his opinion. The opinion of Justice Nelson was the only one in which all the justices of the majority concurred. It was originally prepared to stand as the opinion of the court. See Thayer's Cases, I, 480, note.

Scott's first case is reported in 15 Mo., 682.

"Had the supreme court confined its action to a denial of jurisdiction in this case on the ground taken by the Missouri state supreme court, the decision would probably have been accepted generally as law, however harsh, in the case of slaves removed temporarily from state jurisdiction and then brought back. But, impelled, as has been charged, by a superserviceable desire to forward the interests and designs of slave-holders in the territories, or as is much more probable, by the wide sweep taken by counsel on both sides in their arguments, the chief justice and the assenting justices proceeded to deliver a course of individual lectures on history, politics, ethics and international law, the exact connection of which with the legal subject matter in hand it was in many cases difficult for the justices themselves to make perfectly clear. In these additions to the denial of jurisdiction lay the interest, importance and far-reaching consequences of the Dred Scott decision. . . . The Dred Scott decision was the last attempt to decide the contest between slavery extension and slavery restriction by form of law." Alexander Johnston in Lalor's Cyclopedia, I, 839, 841.

"It is noticeable that the sting of the decision lay rather in the obiter dicta than in the determination of the main question involved." Bryce, American Commonwealth (3d Ed.), I, 263, note.

"While Chief Justice TANEY has always in the public estimation borne the brunt of this decision, it is nevertheless to be considered that of the nine judges of the court six concurred with him in

holding that the plaintiff was a slave, and that the judgment of the court should be affirmed. Of these six (Catron, Daniel, Wayne, Campbell, Nelson, and Grier) two—not the two least strong—were respectively from the States of New York and Pennsylvania, and had both held important judicial positions in those States before reaching the bench of the Federal Supreme Court. They must all share—and doubtless had none of them any desire to avoid it—the responsibility of this judgment of the court. The opinion in dissent of Justice CURTIS, . . . is profound in its examination of the sources of the law upon the subject; luminous and learned in its consideration of the political and judicial history of the country; and convincing in the conclusions to which it arrives. Hardly too much can be said in praise of this masterly effort." George W. Biddle in Constitutional History as seen in American Law, 180-181.

SLAUGHTER-HOUSE CASES.

16 Wallace, 36. Decided 1873.

[The facts are sufficiently stated in the opinion of the court.]

MR. JUSTICE MILLER now, April 14, 1873, delivered the opinion of the court.

These cases are brought here by writs of error to the Supreme Court of the State of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that State. . . .

The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the State courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this court to review the judgment of the State court on those questions is clear and imperative.

The statute thus assailed as unconstitutional was passed March 8, 1869, and is entitled, "An act to protect the health of the city

of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company."

The first section forbids the landing or slaughtering of animals whose flesh is intended for food, within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughter-houses or abattoirs within those limits, except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition.

The second section designates the corporators, gives the name to the corporation, and confers on it the usual corporate powers.

The third and fourth sections authorize the company to establish and erect within certain territorial limits, therein defined, one or more stock-yards, stock-landings, and slaughter-houses, and impose upon it the duty of erecting, on or before the first day of June, 1869, one grand slaughter-house of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company for each steamboat and for each animal landed.

Section five orders the closing up of all other stock-landings and slaughter-houses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the governor of the State for that purpose.

These are the principal features of the statute, and are all that have any bearing upon the questions to be decided by us.

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of

persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens—the whole of the butchers of the city—of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families; and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city.

But a critical examination of the act hardly justifies these assertions.

It is true that it grants, for a period of twenty-five years, exclusive privileges. And whether those privileges are at the expense of the community in the sense of a curtailment of any of their fundamental rights, or even in the sense of doing them an injury, is a question open to considerations to be hereafter stated. But it is not true that it deprives the butchers of the right to exercise their trade, or imposes upon them any restriction incompatible with its successful pursuit, or furnishing the people of the city with the necessary daily supply of animal food.

The act divides itself into two main grants of privilege,—the one in reference to stock-landings and stock-yards, and the other to slaughter-houses. That the landing of live-stock in large droves, from steamboats on the bank of the river, and from railroad trains, should, for the safety and comfort of the people and the care of the animals, be limited to proper places, and those not numerous, it needs no argument to prove. Nor can it be injurious to the general community that while the duty of making ample preparation for this is imposed upon a few men, or a corporation, they should, to enable them to do it successfully, have the exclusive right of providing such landing-places, and receiving a fair compensation for the service.

It is, however, the slaughter-house privilege, which is mainly relied on to justify the charges of gross injustice to the public, and invasion of private right.

It is not, and cannot be successfully controverted, that it is both the right and the duty of the legislative body—the supreme power of the State or municipality—to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it in those places and nowhere else.

The statute under consideration defines these localities and for-

bids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter-House Company is required, under a heavy penalty, to permit any person who wishes to do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place.

The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may now be questioned in some of its details.

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent,[1] "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community." This is called the police power; and it is declared by Chief Justice Shaw,[2] that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. "It ex-

[1] 2 Commentaries, 340.
[2] Commonwealth v. Alger, 7 Cushing, 84.

tends," says another eminent judge,[3] "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; . . . and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."

The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise. . . . [Here follows an extract from Gibbons v. Ogden, 9 Wheaton, 203].

The exclusive authority of State legislation over this subject is strikingly illustrated in the case of the City of New York v. Miln.[4] In that case the defendant was prosecuted for failing to comply with a statute of New York which required of every master of a vessel arriving from a foreign port, in that of New York City, to report the names of all his passengers, with certain particulars of their age, occupation, last place of settlement, and place of their birth. It was argued that this act was an invasion of the exclusive right of Congress to regulate commerce. And it cannot be denied, that such a statute operated at least indirectly upon the commercial intercourse between citizens of the United States and of foreign countries. But notwithstanding this it was held to be an exercise of the police power properly within the control of the State, and unaffected by the clause of the Constitution which conferred on Congress the right to regulate commerce.

To the same purpose are the recent cases of The License Tax,[5] and United States v. DeWitt.[6] In the latter case an act of Congress which undertook as a part of the internal revenue laws to make it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell oil of petroleum inflammable at less than a prescribed temperature, was held to be void, because as a police regulation the power to make such a law belonged to the States, and did not belong to Congress.

[3] Thorpe v. Rutland and Burlington Railroad Co., 27 Vermont, 149.
[4] 11 Peters, 102.
[5] 5 Wallace, 471.
[6] 9 Id., 41.

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual. But it is said that in creating a corporation for this purpose, and conferring upon it exclusive privileges—privileges which it is said constitute a monopoly—the legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would have been the same as it is now. Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The proposition is ably discussed and affirmed in the case of McCulloch v. The State of Maryland,[7] in relation to the power of Congress to organize the Bank of the United States to aid in the fiscal operations of the government.

It can readily be seen that the interested vigilance of the corporation created by the Louisiana legislature will be more efficient in enforcing the limitation prescribed for the stock-landing and slaughtering business for the good of the city than the ordinary efforts of the officers of the law.

Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation is beyond the power of the legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are not able to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges

[7] 4 Wheat., 316.

to be made by the company are limited by the statute, and we are not advised that they are on the whole exorbitant or unjust.

The proposition is, therefore, reduced to these terms: Can any exclusive privileges be granted to any of its citizens, or to a corporation, by the legislature of a State?

The eminent and learned counsel who has twice argued the negative of this question, has displayed a research into the history of monopolies in England and the European continent, only equalled by the eloquence with which they are denounced.

But it is to be observed, that all such references are to monopolies established by the monarch in derogation of the rights of his subjects, or arise out of transactions in which the people were unrepresented, and their interests uncared for. The great Case of Monopolies, reported by Coke, and so fully stated in the brief, was undoubtedly a contest of the commons against the monarch. The decision is based upon the ground that it was against common law, and the argument was aimed at the unlawful assumption of power by the crown; for who ever doubted the authority of Parliament to change or modify the common law? The discussion in the House of Commons cited from Macaulay clearly establishes that the contest was between the Crown, and the people represented in Parliament.

But we think it may be safely affirmed, that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day continued to grant to persons and corporations exclusive privileges,—privileges denied to other citizens,—privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied, that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.

It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

If any such restraint is supposed to exist in the constitution of the State, the Supreme Court of Louisiana having necessarily

passed on that question, it would not be open to review in this court.

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:—

That it creates an involuntary servitude forbidden by the thirteenth article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

This court is thus called upon for the first time to give construction to these articles.

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go.

Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like all the others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument.

The most cursory glance at these articles discloses a unity of

purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights; additional powers to the Federal government; additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument. Its two short

sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

"1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"2. Congress shall have power to enforce this article by appropriate legislation."

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four million of slaves—and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word "servitude" is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of appreticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word "slavery" had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase, on a writ of habeas corpus under this article, illustrates this course of observation.[1] And it is all that we deem necessary to say on the application of that article to the statute of Louisiana, now under consideration.

The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which

[1] Matter of Turner, 1 Abbott United States Reports, 84.

claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.

Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

Hence the fifteenth amendment, which declares that "the right of a citizen of the United States to vote shall not be denied or abridged by any State on account of race, color, or previous condition of servitude." The negro having, by the fourteenth amendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union.

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese cooly labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship —not only citizenship of the United States, but citizenship of the

States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated Dred Scott case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly

recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words "privileges and immunities"

in our constitutional history, is to be found in the fourth of the articles of the old Confederation.

It declares "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of Corfield v. Coryell, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823.[1]

"The inquiry," he says, "is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole." [The court then cites Ward v. The State

[1] 4 Washington's Circuit Court, 371.

of Maryland, 12 Wallace, 430, and Paul v. Virginia, 8 Wallace, 180].

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citation of authority, that up to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the

reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws.

One of these is well described in the case of Crandall v. Nevada.[1] It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through

[1] 6 Wall., 36.

which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justices in the several States." And quoting from the language of Chief Justice Taney in another case, it is said "that for all the great purposes for which the Federal government was established, we are one people, with one common country, we are all citizens of the United States;" and it is, as such citizens, that their rights are supported in this court in Crandall v. Nevada.

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal

protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government.

We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate

the powers of the National government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.

Unquestionably this has given great force to the argument, and added largely to the number, of those who believe in the necessity of a strong National government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they may have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or any of its parts.

The judgments of the Supreme Court of Louisiana in these cases are affirmed.

[Chief Justice Chase and Justices Field, Swayne, and Bradley dissented. The last three delivered opinions.]

Note.—In 1887 Mr. Justice Miller made the following statement in the nature of a defense of his opinion in this case:

"Although this opinion did not meet the approval of four out of nine of the judges on some of the points on which it rested, yet public sentiment, as found in the press and in the universal acquiescence which it received, accepted it with great unanimity; and although there were intimations that in the legislative branches of the Government the opinion would be reviewed and criticised unfavorably, no such thing has occurred in the fifteen years which have elapsed since it was delivered. And while the question of the construction of these amendments, and particularly the Fourteenth, has often been before the Supreme Court of the United States, no attempt to override or disregard this elementary decision of the effect of the three new constitutional amendments upon the relations of the State governments to the Federal government has been made; and it may be considered now as settled that, with the exception of the specific provisions in them for the protection of the personal rights of the citizens and people of the United States, and the necessary restrictions upon the power of the States for that purpose, with the additions to the powers of the General Government to enforce these provisions, no substantial change has been made. The necessity of the great powers, conceded by the Constitution originally to the Federal Government, and the equal necessity of the autonomy of the States and their power to regulate their domestic affairs, remain as the great features of our complex form of government." Miller, Lectures on the Constitution of the United States, 411.

STRAUDER v. WEST VIRGINIA.

100 U. S., 303. Decided 1879.

ERROR to the Supreme Court of Appeals of the State of West Virginia.

The facts are stated in the opinion of the court. . . .

MR. JUSTICE STRONG delivered the opinion of the court.

The plaintiff in error, a colored man, was indicted for murder in the Circuit Court of Ohio County, in West Virginia, on the 20th of October, 1874, and upon trial was convicted and sentenced. The record was then removed to the Supreme Court of the State, and there the judgment of the Circuit Court was affirmed. The present case is a writ of error to that court, and it is now, in sub-

stance, averred that at the trial in the State court the defendant (now plaintiff in error) was denied rights to which he was entitled under the Constitution and laws of the United States.

In the Circuit Court of the State, before the trial of the indictment was commenced, the defendant presented his petition, verified by his oath, praying for a removal of the cause into the Circuit Court of the United States, assigning, as ground for the removal, that, "by virtue of the laws of the State of West Virginia no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State; that white men are so eligible, and that by reason of his being a colored man and having been a slave, he had reason to believe, and did believe, he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens, and that he had less chance of enforcing in the courts of the State his rights on the prosecution, as a citizen of the United States, and that the probabilities of a denial of them to him as such citizen on every trial which might take place on the indictment in the courts of the State were much more enhanced than if he was a white man." This petition was denied by the State court, and the cause was forced to trial.

Motions to quash the venire, "because the law under which it was issued was unconstitutional, null, and void," and successive motions to challenge the array of the panel, for a new trial, and in arrest of judgment were then made, all of which were overruled and made by exceptions parts of the record.

The law of the State to which reference was made in the petition for removal and in the several motions was enacted on the 12th of March, 1873 (Acts of 1872-73, p. 102), and it is as follows: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." The persons excepted are State officials.

In this court, several errors have been assigned, and the controlling questions underlying them all are, first, whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impanelled without discrimination against his race or color, because of race or color; and, second, if he has such a right, and is denied its enjoyment by the State in which he is indicted, may he cause the case to be removed into the Circuit Court of the United States?

It is to be observed that the first of these questions is not whether

a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury. . . .

This [the Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the Slaughter-House Cases (16 Wall., 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. . . . [Here follow citations from the Slaughter-House Cases, 16 Wallace, 36].

If this is the spirit and meaning of the amendment, whether it

means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice

which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, "The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter." It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called "packing juries." It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection.

In view of these considerations, it is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offence against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is

not protection of life and liberty against race or color prejudice a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

We do not say that within the limits from which it is not excluded by the amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it. To quote further from 16 Wall., supra: "In giving construction to any of these articles [amendments], it is necessary to keep the main purpose steadily in view." "It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." We are now called upon to affirm or deny that it had other purposes.

The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution.

Concluding, therefore, that the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offense against the State, it remains only to be considered whether the power of Congress to enforce the provisions of the Fourteenth Amendment by appropriate legislation is sufficient to justify the enactment of sect. 641 of the Revised Statutes.

A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of

power, may be protected by Congress. Prigg v. The Commonwealth of Pennsylvania, 16 Pet., 539. So in United States v. Reese (92 U. S., 214) it was said by the Chief Justice of this court: "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of the protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide. These may be varied to meet the necessities of the particular right to be protected." But there is express authority to protect the rights and immunities referred to in the Fourteenth Amendment, and to enforce observance of them by appropriate congressional legislation. And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case from a State court, in which the right is denied by the State law, into a Federal court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Sec. 641 is such a provision. . . . This act puts in the form of a statute what had been substantially ordained by the constitutional amendment. It was a step toward enforcing the constitutional provisions. Sec. 641 was an advanced step, fully warranted, we think, by the fifth section of the Fourteenth Amendment.

We have heretofore considered and affirmed the constitutional power of Congress to authorize the removal from State courts into the circuit courts of the United States, before trial, of criminal prosecutions for alleged offenses against the laws of the State, when the defense presents a Federal question, or when a right under the Federal Constitution or laws is involved. Tennessee v. Davis, supra, p. 257. It is unnecessary now to repeat what we there said.

That the petition of the plaintiff in error, filed by him in the State court before the trial of his case, made a case for removal into the Federal Circuit Court, under sect. 641, is very plain, if, by the constitutional amendment and sect. 1977 of the Revised Statutes, he was entitled to immunity from discrimination against him in the selection of jurors, because of their color, as we have endeavored to show that he was. It set forth sufficient facts to exhibit a denial of that immunity, and a denial by the statute law of the State.

There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed, as also in over-

ruling his challenge to the array of the jury, and in refusing to quash the panel.

The judgment of the Supreme Court of West Virginia will be reversed, and the case remitted with instructions to reverse the judgment of the Circuit Court of Ohio County; and it is

So ordered

[JUSTICE FIELD and JUSTICE CLIFFORD dissented.]

CIVIL RIGHTS CASES.

UNITED STATES v. STANLEY. UNITED STATES v. RYAN. UNITED STATES v. NICHOLS. UNITED STATES v. SINGLETON. ROBINSON AND WIFE v. MEMPHIS AND CHARLESTON RAILROAD COMPANY.

109 U. S., 3. Decided 1883.

These cases are all founded on the first and second sections of the Act of Congress, known as the Civil Rights Act, passed March 1st, 1875, entitled "An Act to protect all citizens in their civil and legal rights." 18 Stat., 335. Two of the cases, those against Stanley and Nichols, were indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, were, one an information, the other an indictment, for denying to individuals the privileges and accommodations of a theater, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theatre in San Francisco; and the indictment against Singleton was for denying to another person, whose color was not stated, the full enjoyment of the accommodations of the theatre known as the Grand Opera House in New York, "said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." The case of Robinson and wife against the Memphis & Charleston R. R. Company was an action brought in the Circuit Court of the United States for the Western District of Tennessee, to recover the penalty of five hundred dollars given by the second section of the act; and the gravamen was the refusal by the conductor of the railroad company to allow the wife to ride in the ladies' car for the reason as stated in one of the counts, that she was a person of African descent. The jury rendered a verdict for

the defendants in this case, upon the merits, under a charge of the court to which a bill of exceptions was taken by the plaintiffs. The case was tried on the assumption by both parties of the validity of the act of Congress; and the principal point made by the exceptions was, that the judge allowed evidence to go to the jury tending to show that the conductor had reason to suspect that the plaintiff, the wife, was an improper person, because she was in company with a young man whom he supposed to be a white man, and on that account inferred that there was some improper connection between them; and the judge charged the jury, in substance, that if this was the conductor's bona fide reason for excluding the woman from the car they might take it into consideration on the question of the liability of the company. The case was brought here by writ of error at the suit of the plaintiffs. The cases of Stanley, Nichols, and Singleton, came up on certificates of division of opinion between the judges below as to the constitutionality of the first and second sections of the act referred to; and the case of Ryan, on a writ of error to the judgment of the Circuit Court for the District of California sustaining a demurrer to the information.

The Stanley, Ryan, Nichols, and Singleton cases were submitted together, by the Solicitor-General at the last term of court, on the 7th day of November, 1882. There were no appearances and no briefs filed for the defendants.

The Robinson case was submitted on the briefs at the last term, on the 29th day of March, 1883. . . .

Mr. Justice Bradley delivered the opinion of the court. After stating the facts in the above language he continued:

It is obvious that the primary and important question in all the cases is the constitutionality of the law: for if the law is unconstitutional none of the prosecutions can stand.

The sections of the law referred to provide as follows:

"Sec. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous

condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: Provided, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this Act or the criminal law of any State: And provided further, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

Are these sections constitutional? The first section, which is the principal one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part.

The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare, that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and vice versa. The second section makes it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amend-

ments. The power is sought, first, in the Fourteenth Amendment, and the views and arguments of distinguished Senators, advanced whilst the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that Congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere brutum fulmen, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amend-

ment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in United States v. Cruikshank, 92 U. S., 542; Virginia v. Rives, 100 U. S., 313; and Ex parte Virginia, 100 U. S., 339.

An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example. The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by State legislation might be counteracted and corrected: and this power was exercised. The remedy which Congress actually provided was that contained in the 25th section of the Judiciary Act of 1789, 1 Stat., 85, giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of State courts whenever they should sustain the validity of a State statute or authority alleged to be repugnant to the Constitution or laws of the United States. By this means, if a State law was passed impairing the obligation of a contract, and the State tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of Congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally; and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a State law; and under the broad provisions of the act of March 3d, 1875, ch. 137, 18 Stat., 470, giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that, or any other law, it must appear as well by allegation, as

proof at the trial, that the Constitution had been violated by the action of the State legislature. Some obnoxious State law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against State laws impairing the obligation of contracts.

And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference what-

ever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty, and property without due process of law (and the amendment itself does not suppose this), why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theatres? The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

We have not overlooked the fact that the fourth section of the act now under consideration has been held by this court to be constitutional. That section declares "that no citizen, possessing all other qualifications which are or may be prescribed by law,

shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars." In Ex parte Virginia, 100 U. S., 339, it was held that an indictment against a State officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the State government, carry into effect such a rule of disqualification. In the Virginia case, the State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute-book of the State actually laid down any such rule of disqualification, or not, the State, through its officer, enforced such a rule: and it is against such State action, through its officers and agents, that the last clause of the section is directed. This aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering.

These sections, in the objectionable features before referred to, are different also from the law ordinarily called the "Civil Rights Bill," originally passed April 9th, 1866, 14 Stat., 27, ch. 31, and re-enacted with some modifications in sections 16, 17, and 18, of the Enforcement Act, passed May 31st, 1870, 16 Stat., 140, ch. 114. That law, as re-enacted, after declaring that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding, proceeds to enact, that any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any rights secured or pro-

tected by the preceding section (above quoted), or to different punishment, pains, or penalties, on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment as specified in the act. This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. In the Revised Statutes, it is true, a very important clause, to wit, the words "any law, statute, ordinance, regulation or custom to the contrary notwithstanding," which gave the declaratory section its point and effect, are omitted; but the penal part, by which the declaration is enforced, and which is really the effective part of the law, retains the reference to State laws, by making the penalty apply only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any State or Territory: thus preserving the corrective character of the legislation. Rev. St., §§ 1977, 1978, 1979, 5510. The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretence that it had been rendered void or invalid by a State law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defense.

In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian vio-

lence at the polls, or slander the good name of a fellow-citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States, and with the Indian tribes, the coining of money, the establishment of post-offices and post-roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of State officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be (and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of United States v. Harris, 106 U. S., 629), it is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment. That amendment prohibits the States from denying to any person the equal protection of the laws, and declares that Congress shall have power to enforce, by appropriate legislation, the provisions

of the amendment. The law in question, without any reference to adverse State legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not.

We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right, or not, is a different question which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consideration in the cases before us: they all being cases arising within the limits of States. And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.

But the power of Congress to adopt direct and primary, as distinguished from corrective legislation, on the subject in hand, is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery. This amendment declares "that neither slavery, nor involuntary servitude, except as a punishment for

crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;" and it gives Congress power to enforce the amendment by appropriate legislation.

This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

It is true that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States: and upon this assumption it is claimed, that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of amusement; the argument being, that the denial of such equal accommodations and privileges is, in itself, a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theatre, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment.

In a very able and learned presentation of the cognate question as to the extent of the rights, privileges and immunities of citizens which cannot rightfully be abridged by State laws under the Four-

teenth Amendment, made in a former case, a long list of burdens and disabilities of a servile character, incidental to feudal vassalage in France, and which were abolished by the decrees of the National Assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another were servitudes, or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom, which had the force of law, and exacted by one man from another without the latter's consent. Should any such servitudes be imposed by a State law, there can be no doubt that the law would be repugnant to the Fourteenth, no less than to the Thirteenth Amendment; nor any greater doubt that Congress has adequate power to forbid any such servitude from being exacted.

But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theatre, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the State law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question. But what has it to do with the question of slavery?

It may be that by the Black Code (as it was called), in the times when slavery prevailed, the proprietors of inns and public conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. This was merely a means of preventing such escapes, and was no part of the servitude itself. A law of that kind could not have any such object now, however justly it might be deemed an invasion of the party's legal right as a citizen, and amenable to the prohibitions of the Fourteenth Amendment.

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, under-

took to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterward received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.

The only question under the present head, therefore, is, whether

the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse-stealing, for example) to be seized and hung by the posse comitatus without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment, but would not necessarily be so to the Thirteenth, when not involving the idea of any subjection of one man to another. The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the States by the Fourteenth Amendment are forbidden to deny to any person? And is the Constitution violated until the denial of the right has some State sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or

State action, prohibited by the Fourteenth Amendment. It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to accord a remedy under that amendment and in accordance with it.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment (which merely abolishes slavery), but by force of the Thirteenth [Fourteenth?] and Fifteenth Amendments.

On the whole, we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendments of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned.

This conclusion disposes of the cases now under consideration. In the cases of the United States v. Michael Ryan, and of Richard A. Robinson and Wife v. The Memphis & Charleston Railroad Company, the judgments must be affirmed. In the other cases,

the answer to be given will be that the first and second sections of the act of Congress of March 1st, 1875, entitled "An Act to protect all citizens in their civil and legal rights," are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly.

And it is so ordered.

[Mr. Justice Harlan delivered a dissenting opinion.]

HURTADO v. CALIFORNIA.

110 U. S., 516. Decided 1884.

The Constitution of the State of California, adopted in 1879, in Article I, section 8, provides as follows:

"Offences heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment without such examination and commitment as may be prescribed by law. A grand jury shall be summoned at least once a year in each county." . . .

[Hurtado, having been charged with murder by an information filed with the District Attorney, was tried by jury, convicted, and sentenced to be hanged. Thereupon he filed certain objections to the execution of the sentence, one of which recited "that the said plaintiff in error had been held to answer for the said crime of murder by the district attorney of the said county of Sacramento, upon an information filed by him, and had been tried and illegally found guilty of said crime, without any presentment or indictment of any grand or other jury, and that the judgment rendered upon the alleged verdict of the jury in such case was and is void, and if executed would deprive the plaintiff in error of his life or liberty without due process of law."]

Mr. Justice Matthews delivered the opinion of the court. After reciting the facts in the foregoing language, he continued:

It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the Fourteenth Article of Amendment of the Constitution of the United States which is in these words:

"Nor shall any State deprive any person of life, liberty, or property without due process of law."

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the States respectively to dispense with in the administration of criminal law. . . . [Here follow citations from Kalloch v. Superior Court, 56 Cal., 229, and Rowan v. The State, 30 Wis., 129.]

On the other hand, it is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the 29th chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

This view is certainly supported by the authority of the great name of Chief Justice Shaw and of the court in which he presided, which, in Jones v. Robbins, 8 Gray, 329, decided that the 12th article of the Bill of Rights of Massachusetts, a transcript of Magna Charta in this respect, made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecutions for felonies. In delivering the opinion of the court in that case, Merrick, J., alone dissenting, the Chief Justice said:

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury, in case of high

offenses, is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." . . . "It having been stated," he continued, "by Lord Coke, that by the 'law of the land' was intended a due course of proceeding according to the established rules and practice of the courts of common law, it may, perhaps, be suggested that this might include other modes of proceeding sanctioned by the common law, the most familiar of which are, by informations of different kinds, by the officers of the crown in the name of the King. But, in reply to this, it may be said that Lord Coke himself explains his own meaning by saying 'the law of the land,' as expressed in Magna Charta, was intended due process of law, that is, by indictment or presentment of good and lawful men. And further, it is stated on the authority of Blackstone, that informations of every kind are confined by the constitutional law to misdemeanors only. 4 Bl. Com., 310." . . .

This view of the meaning of Lord Coke is the one taken by Merrick, J., in his dissenting opinion in Jones v. Robbins, 8 Gray, 329, who states his conclusions in these words:

"It is the forensic trial, under a broad and general law, operating equally upon every member of our community, which the words 'by the law of the land,' in Magna Charta, and in every subsequent declaration of rights which has borrowed its phraseology, make essential to the safety of the citizen, securing thereby both his liberty and his property, by preventing the unlawful arrest of his person or any unlawful interference with his estate." See also State v. Starling, 15 Rich. (S. C.) Law, 120.

Mr. Reeve, in 2 History of Eng. Law, 43, translates the phrase, *nisi per legale judicium parium suorum vel per legem terræ.*

"But by the judgment of his peers, or by some other legal process or proceeding adapted by the law to the nature of the case."

Chancelor Kent, 2 Com., 13, adopts this mode of construing the phrase. Quoting the language of Magna Charta, and referring to Lord Coke's comment upon it, he says:

"The better and larger definition of due process of law is that it means law in its regular course of administration through courts of justice."

This accords with what is said in Westervelt v. Gregg, 12 N. Y., 202, by Denio, J., p. 212:

"The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government."

The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in Bank of Columbia v. Okely, 4 Wheat., 235-244:

"As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

And the conclusion rightly deduced is, as stated by Mr. Cooley, Constitutional Limitations, 356:

"The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen."

It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in Murray's Lessee v. Hoboken Land & Improvement Company, 18 How., 272. There Mr. Justice Curtis, delivering the opinion of the court, after showing, p. 276, that due process of law must mean something more than the actual existing law of the land, for otherwise it would be no restraint upon legislative power, proceeds as follows:

"To what principle, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

This, it is argued, furnishes an indispensable test of what constitutes "due process of law;" that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.

But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the

sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

This would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally. . . .

This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. Sir James Mackintosh ascribes this principle of development to Magna Charta itself. To use his own language:

"It was a peculiar advantage that the consequences of its principles were, if we may so speak, only discovered slowly and gradually. It gave out on each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required and as their character would safely bear. For almost five centuries it was appealed to as the decisive authority on behalf of the people, though commonly so far only as the necessities of each case demanded." 1 Hist. of England, 221.

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive

justice,—*suum cuique tribuere.* There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, ex post facto laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in Bonham's Case, 8 Rep., 115, 118a, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when

imposed on the just and necessary discretion of legislative power; and, while in every instance, laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet, any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, "may alter the mode and application, but have no power over the substance of original justice." Tract on the Popery Laws, 6 Burke's Works, ed. Little & Brown, 323.

Such is the often-repeated doctrine of this court. . . . [Here are given quotations from Munn v. Ill., 94 U. S., 113; Walker v. Savinet, 92 U. S., 90; Kennard v. Louisiana, 92 U. S., 480; Davidson v. N. O., 96 U. S., 97.]

We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself." [It then immediately adds:] "Nor be deprived of life, liberty, or property without due process of law."

According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and

with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. . . . [Here follows a citation from Missouri v. Lewis, 101 U. S., 22-31.]

But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society;" and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its objects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the

power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.

The Supreme Court of Mississippi, in a well-considered case,—Brown v. Levee Commissioners, 50 Miss., 468,—speaking of the meaning of the phrase "due process of law," says: "The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due process of law.'" . . . [Here follows a citation from Loan Association v. Topeka, 20 Wallace, 655-662.]

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.

The Constitution of Connecticut, adopted in 1818 and in force when the Fourteenth Amendment took effect, requires an indictment or presentment of a grand jury only in cases where the punishment of the crime charged is death or imprisonment for life, and yet it also declares that no person shall "be deprived of life, liberty, or property but by due course of law." It falls short, therefore, of that measure of protection which it is claimed is guaranteed by Magna Charta to the right of personal liberty; notwithstanding which it is no doubt justly said in Swift's Digest, 17, that

"This sacred and inestimable right, without which all others are of little value, is enjoyed by the people of this State in as full extent as in any country on the globe, and in as high a degree as is consistent with the nature of civil government. No individual or body of men has a discretionary or arbitrary power to commit any person to prison: no man can be restrained of his liberty, be prevented from removing himself from place to place as he chooses, be compelled to go to a place contrary to his inclination, or be in any way imprisoned or confined, unless by virtue of the express laws of the land."

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by

a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offense of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as a consequence of a regular judicial trial, conducted precisely as in cases of indictments.

In reference to this mode of proceeding at the common law, and which he says "is as ancient as the common law itself," Blackstone adds (4 Com., 305):

"And as to those offenses in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his Majesty's Court of King's Bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment."

For these reasons, finding no error therein, the judgment of the Supreme Court of California is *affirmed.*

[Mr. Justice Harlan rendered a dissenting opinion.]

UNITED STATES v. KAGAMA.

118 U. S., 375. Decided 1886.

The case is stated in the opinion of the court. . . .

Mr. Justice Miller delivered the opinion of the court.

The case is brought here by certificate of division of opinion between the Circuit Judge and the District Judge holding the Circuit Court of the United States for District of California.

The questions certified arise on a demurrer to an indictment against two Indians for murder committed on the Indian reservation of Hoopa Valley, in the State of California, the person murdered being also an Indian of said reservation.

Though there are six questions certified as the subject of difference, the point of them all is well set out in the third and sixth, which are as follows:—

"3. Whether the provisions of said section 9 (of the act of Congress of March 3, 1885), making it a crime for one Indian to commit murder upon another Indian, upon an Indian reservation situated wholly within the limits of a State of the Union, and making such Indian so committing the crime of murder within and upon such Indian reservation 'subject to the same laws' and subject to be 'tried in the same courts, and in the same manner, and subject to the same penalties as are all other persons' committing the crime of murder 'within the exclusive jurisdiction of the United States,' is a constitutional and valid law of the United States?"

"6. Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set apart for the use of the Indian tribe to which said Indians both belong?"

The indictment sets out in two counts that Kagama, alias Pactah Billy, an Indian, murdered Iyouse, alias Ike, another Indian, at Humboldt County, in the State of California, within the limits of the Hoopa Valley Reservation, and it charges Mahawaha, alias Ben, also an Indian, with aiding and abetting in the murder.

The law referred to in the certificate is the last section of the Indian appripriation act of that year, and is as follows:

"§ 9. That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any Territory of the United States, and either within or without the Indian reservation, shall be subject therefor to the laws of said Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be

subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." 23 Stat., ch. 341, 362; § 9, 385.

The above enactment is clearly separable into two distinct definitions of the conditions under which Indians may be punished for the same crimes as defined by the common law. The first of these is where the offense is committed within the limits of a territorial government, whether on or off an Indian reservation. In this class of cases the Indian charged with the crime shall be judged by the laws of the Territory on that subject, and tried by its courts. This proposition itself is new in legislation of Congress, which has heretofore only undertaken to punish an Indian who sustains the usual relation to his tribe, and who commits the offense in the Indian country, or on an Indian reservation, in exceptional cases; as where the offense was against the person or property of a white man, or was some violation of the trade and intercourse regulations imposed by Congress on the Indian tribes. It is new, because it now proposes to punish these offenses when they are committed by one Indian on the person or property of another.

The second is where the offense is committed by one Indian against the person or property of another, within the limits of a State of the Union, but on an Indian reservation. In this case, of which the State and its tribunals would have jurisdiction if the offense was committed by a white man outside an Indian reservation, the courts of the United States are to exercise jurisdiction as if the offense had been committed at some place within the exclusive jurisdiction of the United States. The first clause subjects all Indians guilty of these crimes committed within the limits of a Territory, to the laws of that Territory, and to its courts for trial. The second, which applies solely to offenses by Indians which are committed within the limits of a State and the limits of a reservation, subjects the offenders to the laws of the United States passed for the government of places under the exclusive jurisdiction of those laws, and to trial by the courts of the United States. This is a still further advance, as asserting this jurisdiction over the Indians within the limits of the States of the Union.

Although the offense charged in this indictment was committed within a State and not within a Territory, the considerations which are necessary to a solution of the problem in regard to the one must in a large degree affect the other.

The Constitution of the United States is almost silent in regard

to the relations of the government which was established by it to the numerous tribes of Indians within its borders.

In declaring the basis on which representation in the lower branch of Congress and direct taxation should be apportioned, it was fixed that it should be according to numbers, excluding Indians not taxed, which, of course, excluded nearly all of that race, but which meant that if there were such within a State as were taxed to support the government, they should be counted for representation, and in the computation for direct taxes levied by the United States. This expression, excluding Indians not taxed, is found in the XIVth amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. Neither of these shed much light on the power of Congress over the Indians in their existence as tribes, distinct from the ordinary citizens of a State or Territory.

The mention of Indians in the Constitution which has received most attention is that found in the clause which gives Congress "power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

This cause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes. While we are not able to see, in either of these clauses of the Constitution and its amendments, any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians, there is a suggestion in the manner in which the Indian tribes are introduced into that clause, which may have a bearing on the subject before us. The commerce with foreign nations is distinctly stated as submitted to the control of Congress. Were the Indian tribes foreign nations? If so, they came within the first of the three classes of commerce mentioned, and did not need to be repeated as Indian tribes. Were they nations, in the minds of the framers of the Constitution? If so, the natural phrase would have been "foreign nations and Indian nations," or, in the terseness of language uni-

formly used by the framers of the instrument, it would naturally have been "foreign and Indian nations." And so in the case of The Cherokee Nation v. The State of Georgia, 5 Pet., 1, 20, brought in the Supreme Court of the United States, under the declaration that the judicial power extends to suits between a State and foreign States, and giving to the Supreme Court original jurisdiction where a State is a party, it was conceded that Georgia as a State came within the clause, but held that the Cherokees were not a State or nation within the meaning of the Constitution, so as to be able to maintain the suit.

But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. What authority the State governments may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else. Murphy v. Ramsey, 114 U. S., 15, 44.

In the case of American Ins. Co. v. Canter, 1 Pet., 511, 542, in which the condition of the people of Florida, then under a territorial government, was under consideration, Marshall, Chief Justice, said: "Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

In the case of the United States v. Rogers, 4 How., 567, 572,

where a white man pleaded in abatement to an indictment for murder committed in the country of the Cherokee Indians, that he had been adopted by and become a member of the Cherokee tribe, Chief Justice Taney said: "The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any particular State. It is true it is occupied by the Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold with the assent of the United States, and under their authority." After referring to the policy of the European nations and the United States in asserting dominion over all the country discovered by them, and the justice of this course, he adds: "But had it been otherwise, and were the right and the propriety of exercising this power now open to question, yet it is a question for the law-making and political departments of the government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute, that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority, and when the country occupied by one of them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian."

The Indian reservation in the case before us is land bought by the United States from Mexico by the treaty of Guadaloupe Hidalgo, and the whole of California, with the allegiance of its inhabitants, many of whom were Indians, was transferred by that treaty to the United States.

The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.

Following the policy of the European governments in the discovery of America towards the Indians who were found here, the colonies before the Revolution and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which this

could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

Perhaps the best statement of their position is found in the two opinions of this court by Chief Justice Marshall in the case of The Cherokee Nation v. Georgia, 5 Pet., 1, and in the case of Worcester v. State of Georgia, 6 Pet., 515, 536. These opinions are exhaustive; and in the separate opinion of Mr. Justice Baldwin, in the former, is a very valuable resumé of the treaties and statutes concerning the Indian tribes previous to and during the confederation.

In the first of the above cases it was held that these tribes were neither States nor nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the State of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them.

In the opinions in these cases they are spoken of as "wards of the nation," "pupils," as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in § 2079 of the Revised Statutes:

"No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

The case of Crow Dog, 109 U. S., 556, in which an agreement

with the Sioux Indians, ratified by an act of Congress, was supposed to extend over them the laws of the United States and the jurisdiction of its courts, covering murder and other grave crimes, shows the purpose of Congress in this new departure. The decision in that case admits that if the intention of Congress had been to punish, by the United States courts, the murder of one Indian by another, the law would have been valid. But the court could not see, in the agreement with the Indians sanctioned by Congress, a purpose to repeal § 2146 of the Revised Statutes, which expressly excludes from that jurisdiction the case of a crime committed by one Indian against another in the Indian country. The passage of the act now under consideration was designed to remove that objection, and to go further by including such crimes on reservations lying within a State.

Is this latter fact a fatal objection to the law? The statute itself contains no express limitations upon the powers of a State or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State, and made it punishable in the courts of the United States. But Congress has done this, and can do it with regard to all offenses relating to matters to which the Federal authority extends. Does that authority extend to this case?

It will be seen at once that the nature of the offense (murder) is one which in almost all cases of its commisison is punishable by the laws of the States, and within the jurisdiction of their courts. The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the State for the residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.

It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weak-

ness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

In the case of Worcester v. The State of Georgia, above cited, it was held that, though the Indians had by treaty sold their land within that State and agreed to remove away, which they failed to do, the State could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the State and the process of its courts.

The same thing was decided in the case of Fellows v. Blacksmith & Others, 19 How., 366. In this case, also, the Indians had sold their lands under supervision of the States of Massachusetts and New York, and had agreed to remove within a given time. When the time came a suit to recover some of the land was brought in the Supreme Court of New York, which gave judgment for the plaintiff. But this court held, on writ of error, that the State could not enforce this removal, but the duty and power to do so was in the United States. See also the case of the Kansas Indians, 5 Wall., 737; New York Indians, 5 Wall., 761.

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

We answer the questions propounded to us, that the 9th section of the act of March, 1885, is a valid law in both its branches, and that the Circuit Court of the United States for the District of California has jurisdiction of the offense charged in the indictment in this case.

NOTE.—In United States v. Wong Kim Ark, 169 U. S., 649 (1898), the court held that a child born in California of parents subject to the Emperor of China was born a citizen of the United States, even though his parents were by law expressly excluded from American citizenship. On this decision see Boyd, "The Basis of Citizenship," in The Nation for July 7, 1898.

XII. THE FEDERAL GOVERNMENT AND THE STATES.

TEXAS v. WHITE ET AL.

7 Wallace, 700. Decided 1868.

[The facts are sufficiently stated in the opinion of the court.]

THE CHIEF JUSTICE delivered the opinion of the court.

This is an original suit in this court, in which the State of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the National government, and to compel the surrender of the bonds to the State.

It appears from the bill, answers, and proofs, that the United States, by act of September 9, 1850, offered to the State of Texas, in compensation for her claims connected with the settlement of her boundary, $10,000,000 in five per cent. bonds, each for the sum of $1,000; and that this offer was accepted by Texas. One-half of these bonds were retained for certain purposes in the National treasury, and the other half were delivered to the State. The bonds thus delivered were dated January 1, 1851, and were all made payable to the State of Texas, or bearer, and redeemable after the 31st day of December, 1864. They were received in behalf of the State by the comptroller of public accounts, under authority of an act of the legislature, which, besides giving that authority, provided that no bond should be available in the hands of any holder until after indorsement by the governor of the State.

After the breaking out of the rebellion, the insurgent legislature of Texas, on the 11th of January, 1862, repealed the act requiring the indorsement of the governor,[1] and on the same day provided for the organization of a military board, composed of the governor, comptroller, and treasurer; and authorized a majority of that board to provide for the defense of the State by means of any bonds in the treasury, upon any account, to the extent of $1,000,000.[2] The

[1] Acts of Texas, 1862, p. 45. [2] Texas Laws, 55.

defense contemplated by the act was to be made against the United States by war. Under this authority the military board entered into an agreement with George W. White and John Chiles, two of the defendants, for the sale to them of one hundred and thirty-five of these bonds, then in the treasury of the State, and seventy-six more, than deposited with Droege & Co., in England; in payment for which they engaged to deliver to the board a large quantity of cotton cards and medicines. This agreement was made on the 12th of January, 1865. On the 12th of March, 1865, White and Chiles received from the military board one hundred and thirty-five of these bonds, none of which were indorsed by any governor of Texas. Afterward, in the course of the years 1865 and 1866, some of the same bonds came into the possession of others of the defendants, by purchase, or as security for advances of money.

Such is a brief outline of the case. It will be necessary hereafter to refer more in detail to some particular circumstances of it.

The first inquiries to which our attention was directed by counsel, arose upon the allegations of the answer of Chiles (1) that no sufficient authority is shown for the prosecution of the suit in the name and on the behalf of the State of Texas; and (2) that the State, having severed her relations with a majority of the States of the Union, and having by her ordinance of secession attempted to throw off her allegiance to the Constitution and government of the United States, has so far changed her status as to be disabled from prosecuting suits in the National courts.

The first of these allegations is disproved by the evidence. A letter of authority, the authenticity of which is not disputed, has been produced, in which J. W. Throckmorton, elected governor under the constitution adopted in 1866, and proceeding under an act of the State legislature relating to these bonds, expressly ratifies and confirms the action of the solicitors who filed the bill, and empowers them to prosecute this suit; and it is further proved by the affidavit of Mr. Paschal, counsel for the complainant, that he was duly appointed by Andrew J. Hamilton, while provisional governor of Texas, to represent the State of Texas in reference to the bonds in controversy, and that his appointment has been renewed by E. M. Pease, the actual governor. If Texas was a State of the Union at the time of these acts, and these persons or either of them, were competent to represent the State, this proof leaves no doubt about the question of authority.

The other allegation presents a question of jurisdiction. It is not questioned that this court has original jurisdiction of suits by States against citizens of other States, or that the States entitled

to invoke this jurisdiction must be States of the Union. But, it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such States.

If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it.

. . .

It [the word state] describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government. . . .

In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country. . . .

In all respects, so far as the objects could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them.

The position thus assumed could only be maintained by arms, and Texas accordingly took part, with the other Confederate States, in the war of the rebellion, which these events made inevitable. During the whole of that war there was no governor, or judge, or any other State officer in Texas, who recognized the National authority. Nor was any officer of the United States permitted to exercise any authority whatever under the National government within the limits of the States, except under the immediate protection of the National military forces.

Did Texas, in consequence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right

of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation, each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the States in union, there could be no such political body as the United States."[1] Not only therefore can there be no loss of separate and independent autonomy to the States, through their union and under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible States.

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union and all the guarantees of republican government in the Union, attached at once to the State. The act which con-

[1] County of Lane v. The State of Oregon, 7 Wallace, 76.

summated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered therefore as transacted under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the National government, so far at least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of States and citizens to the Union.

No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the National authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. The chief functionaries left the State. Many of the subordinate officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates, or supplied more directly the needful restraints.

A great social change increased the difficulty of the situation. Slaves, in the insurgent States, with certain local exceptions, had been declared free by the Proclamation of Emancipation; and whatever questions might be made as to the effect of that act, under the Constitution, it was clear, from the beginning, that its practical operation, in connection with legislative acts of like tendency, must be complete enfranchisement. Wherever the National forces obtained control, the slaves became freemen. Support to the acts of Congress and the proclamation of the President,

concerning slaves, was made a condition of amnesty[1] by President Lincoln, in December, 1863, and by President Johnson, in May, 1865.[2] And emancipation was confirmed, rather than ordained, in the insurgent States, by the amendment to the Constitution prohibiting slavery throughout the Union, which was proposed by Congress in February, 1865, and ratified, before the close of the following autumn, by the requisite three-fourths of the States.[3]

The new freemen necessarily became part of the people, and the people still constituted the State; for States, like individuals, retain their identity, though changed to some extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guarantee.

There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old Constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.

In the exercise of the power conferred by the guarantee clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

It is not important to review, at length, the measures which have been taken, under this power, by the executive and legislative departments of the National government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smouldered in Texas, the President of the United States issued his proclamation appointing a provisional governor for the State, and providing for the assembling of a convention, with a view to the re-establishment of a republican government, under an amended constitution, and to the restoration of the State to her proper constitutional relations. A convention was accordingly assembled, the constitution amended,

[1] 13 Stats. at Large, 737.
[2] Ib., 758.
[3] Ib., 774-775.

elections held, and a State government, acknowledging its obligations, to the Union, established.

Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so long as the war continued, it cannot be denied that he might institute temporary government within insurgent districts, occupied by the National forces, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

But the power to carry into effect the clause of guarantee is primarily a legislative power, and resides in Congress. "Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not."

This is the language of the late Chief Justice, speaking for this court, in a case from Rhode Island,[4] arising from the organization of opposing governments in that State. And we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence; though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. It was taken after the term of the 38th Congress had expired. The 39th Congress, which assembled in December, 1865, followed by the 40th Congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the Constitution, and in the acts known as the Reconstruction Acts, which have been so far carried into effect, that a majority of the States which were engaged in the rebellion have been restored to their constitutional relations, under forms of government, adjudged to be republican by Congress,

[4] Luther v. Borden, 7 Howard, 42.

through the admission of their "Senators and Representatives into the councils of the Union."

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these acts.

But it is important to observe that these acts themselves show that the governments, which had been established and had been in actual operation under executive direction, were recognized by Congress as provisional, as existing, and as capable of continuance.

By the act of March 2, 1867,[5] the first of the series, these governments were, indeed, pronounced illegal and were subjected to military control, and were declared to be provisional only; and by the supplementary act of July 19, 1867, the third of the series, it was further declared that it was the true intent and meaning of the act of March 2, that the governments then existing were not legal State governments, and if continued, were to be continued subject to the military commanders of the respective districts and to the paramount authority of Congress. We do not inquire here into the constitutionality of this legislation so far as it relates to military authority, or to the paramount authority of Congress. It suffices to say, that the terms of the acts necessarily imply recognition of actually existing governments; and that in point of fact, the governments thus recognized, in some important respects, still exist.

What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the State was appointed by the President in 1865; in 1866 a governor was elected by the people under the constitution of that year; at a subsequent date a governor was appointed by the commander of the district. Each of the three exercised executive functions and actually represented the State in the executive department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the State. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority.

The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence. . . .

On the whole case, therefore, our conclusion is that the State of

[5] 14 Stats. at Large, 428.

Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.

Mr. Justice Grier dissenting. I regret that I am compelled to dissent from the opinion of the majority of the court on all the points raised and to be decided in this case.

The first question in order is the jurisdiction of the court to entertain this bill in behalf of the State of Texas.

The original jurisdiction of this court can be invoked only by one of the United States. The Territories have no such right conferred on them by the Constitution, nor have the Indian tribes who are under the protection of the military authorities of the government.

Is Texas one of these United States? Or was she such at the time this bill was filed, or since?

This is to be decided as a political fact, not as a legal fiction. This court is bound to know and notice the public history of the nation.

If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States. I do not think it necessary to notice any of the very astute arguments which have been advanced by the learned counsel in this case, to find the definition of a State, when we have the subject treated in a clear and common-sense manner by Chief Justice Marshall, in the case of Hepburn & Dundas v. Ellzey.[6] As the case is short, I hope to be excused for a full report of it, as stated and decided by the court. He says:

"The question is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia. This depends on the act of Congress describing the jurisdiction of that court. The act gives jurisdiction to the Circuit Courts in cases between a citizen of the State in which the suit is brought, and a citizen of another State. To support the jurisdiction in this case, it must appear that Columbia is a State. On the part of the plaintiff, it has been urged that Columbia is a distinct political society, and is, therefore, a 'State' according to the definition of writers on general law. This is true; but as the act of Congress obviously uses the word 'State' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy only are the

36 [6] 2 Cranch, 452.

States contemplated in the Constitution. The House of Representatives is to be composed of members chosen by the people of the several States, and each State shall have at least one representative. 'The Senate of the United States shall be composed of two senators from each State.' Each State shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives. These clauses show that the word 'State' is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations."

Now we have here a clear and well-defined test by which we may arrive at a conclusion with regard to the questions of fact now to be decided.

Is Texas a State, now represented by members chosen by the people of that State and received on the floor of Congress? Has she two senators to represent her as a State in the Senate of the United States? Has her voice been heard in the late election of President? Is she not now held and governed as a conquered province by military force? The act of Congress of March 2d, 1867, declares Texas to be a "rebel State," and provides for its government until a legal and republican State government could be legally established. It constituted Louisiana and Texas the fifth military district, and made it subject, not to the civil authority, but to the "military authorities of the United States."

It is true that no organized rebellion now exists there, and the courts of the United States now exercise jurisdiction over the people of that province. But this is no test of the State's being in the Union; Dakota is no State, and yet the United States administer justice there as they do in Texas. The Indian tribes, who are governed by military force, cannot claim to be States of the Union. Wherein does the condition of Texas differ from theirs?

Now, by assuming or admitting as a fact the present status of Texas as a State not in the Union politically, I beg leave to protest against any charge of inconsistency as to judicial opinions heretofore expressed as a member of this court, or silently assented to. I do not consider myself bound to express any opinion judicially as to the constitutional right of Texas to exercise the rights and privileges of a State of this Union, or the power of Congress to govern her as a conquered province, to subject her to military domination, and keep her in pupilage. I can only submit to the fact as decided by the political position of the government; and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided that she is not. It is a question

of fact, I repeat, and of fact only. Politically, Texas is not a State in this Union. Whether rightfully out of it or not is a question not before the court. . . .

Mr. Justice Swayne: I concur with my brother Grier as to the incapacity of the State of Texas, in her present condition, to maintain an original suit in this court. The question, in my judgment, is one in relation to which this court is bound by the action of the legislative department of the government.

Upon the merits of the case, I agree with the majority of my brethren.

I am authorized to say that my brother Miller unites with me in these views.

TARBLE'S CASE.

13 Wallace, 397. Decided 1871.

Error to the Supreme Court of Wisconsin.

This was a proceeding on habeas corpus for the discharge of one Edward Tarble, held in the custody of a recruiting officer of the United States as an enlisted soldier, on the alleged ground that he was a minor, under the age of eighteen years at the time of his enlistment, and that he enlisted without the consent of his father.

The writ was issued on the 10th of August, 1869, by a court commissioner of Dane County, Wisconsin, an officer authorized by the laws of that State to issue the writ of habeas corpus upon the petition of parties imprisoned or restrained of their liberty, or of persons on their behalf. It was issued in this case upon the petition of the father of Tarble, in which he alleged that his son, who had enlisted under the name of Frank Brown, was confined and restrained of his liberty by Lieutenant Stone, of the United States army, in the city of Madison, in that State and county; that the cause of his confinement and restraint was that he had, on the 20th of the preceding July, enlisted, and been mustered into the military service of the United States; that he was under the age of eighteen years at the time of such enlistment; that the same was made without the knowledge, consent, or approval of the petitioner; and was, therefore, as the petitioner was advised and believed, illegal; and that the petitioner was lawfully entitled to the custody, care, and services of his son. . . .

[The commissioner held that the prisoner was illegally detained by Lieutenant Stone, and ordered his discharge. Afterwards Lieutenant Stone had the proceedings taken to the Supreme Court of Wisconsin, where the order of the commissioner discharging the prisoner was affirmed. That judgment was then brought before the United States Supreme Court on a writ of error prosecuted by the United States.]

Mr. Justice Field, after stating the case, delivered the opinion of the court, as follows:—

The important question is presented by this case, whether a State court commissioner has jurisdiction, upon habeas corpus, to inquire into the validity of the enlistment of soldiers into the military service of the United States, and to discharge them from such service when, in his judgment, their enlistment has not been made in conformity with the laws of the United States. The question presented may be more generally stated thus: Whether any judicial officer of a State has jurisdiction to issue a writ of habeas corpus, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government. For it is evident, if such jurisdiction may be exercised by any judicial officer of a State, it may be exercised by the court commissioner within the county for which he is appointed; and if it may be exercised with reference to soldiers detained in the military service of the United States, whose enlistment is alleged to have been illegally made, it may be exercised with reference to persons employed in any other department of the public service when their illegal detention is asserted. It may be exercised in all cases where parties are held under the authority of the United States, whenever the invalidity of the exercise of that authority is affirmed. The jurisdiction, if it exist at all, can only be limited in its application by the legislative power of the State. It may even reach to parties imprisoned under sentence of the National courts, after regular indictment, trial, and conviction, for offenses against the laws of the United States. As we read the opinion of the Supreme Court of Wisconsin in this case, this is the claim of authority asserted by that tribunal for itself and for the judicial officers of that State. It does, indeed, disclaim any right of either to interfere with parties in custody, under judicial sentence, when the National court pronouncing sentence had jurisdiction to try and punish the offenders, but it asserts, at the same time, for itself and for each of

those officers, the right to determine, upon habeas corpus, in all cases, whether that court ever had such jurisdiction. . . .

It is evident, as said by this court when the case of Booth was finally brought before it, if the power asserted by that State court ever existed, no offense against the laws of the United States could be punished by their own tribunals, without the permission and according to the judgment of the courts of the State in which the parties happen to be imprisoned; that if that power existed in that State court, it belonged equally to every other State court in the Union where a prisoner was within its territorial limits; and, as the different State courts could not always agree, it would often happen that an act, which was admitted to be an offense and justly punishable in one State, would be regarded as innocent and even praiseworthy in another, and no one could suppose that a government, which had hitherto lasted for seventy years, "enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the trusts committed to it, if offenses against its laws could not have been punished without the consent of the State in which the culprit was found." . . . [Here follows an extended discussion of Ableman v. Booth and The United States v. Booth, 21 Howard, 506.]

It is in the consideration of this distinct and independent character of the government of the United States, from that of the government of the several States, that the solution of the question presented in this case, and in similar cases, must be found. There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every State are bound thereby, "anything in the constitution or laws of any State to the contrary notwithstanding." Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of

their asserted authorities, those of the National government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy until judicial decision by the National tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments. "The Constitution," as said by Mr. Chief Justice Taney, "was not framed merely to guard the States against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary, when the Constitution was framed, that many of the rights of sovereignty which the States then possessed should be ceded to the General government; and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a State, or from State authorities." And the judicial power conferred extends to all cases arising under the Constitution, and thus embraces every legislative act of Congress, whether passed in pursuance of it, or in disregard of its provisions. The Constitution is under the view of the tribunals of the United States when any act of Congress is brought before them for consideration.

Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.

Now, among the powers assigned to the National government, is the power "to raise and support armies," and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall

be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. Probably in every county and city in the several States there are one or more officers authorized by law to issue writs of habeas corpus on behalf of persons alleged to be illegally restrained of their liberty; and if soldiers could be taken from the army of the United States, and the validity of their enlistment inquired into by any one of these officers, such proceeding could be taken by all of them, and no movement could be made by the National troops without their commanders being subjected to constant annoyance and embarrassment from this source. The experience of the late rebellion has shown us, that, in times of great popular excitement, there may be found in every State large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void. Power to issue writs of habeas corpus for the discharge of soldiers in the military service, in the hands of parties thus disposed, might be used, and often would be used, to the great detriment of the public service. In many exigencies the measures of the National government might in this way be entirely bereft of their efficacy and value. An appeal in such cases to this court, to correct the erroneous action of these officers, would afford no adequate remedy. Proceedings on habeas corpus are summary, and the delay incident to bringing the decision of a State officer, through the highest tribunal of the State, to this court for review would necessarily occupy years, and in the meantime, where the soldier was discharged, the mischief would be accomplished. It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.

It is true similar embarrassment might sometimes be occasioned, though in a less degree, by the exercise of the authority to issue the writ possessed by judicial officers of the United States, but the ability to provide a speedy remedy for any inconvenience following from this source would always exist with the National legislature.

State judges and State courts, authorized by laws of their States

to issue writs of habeas corpus, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority or claim and color of the authority, of the United States, and not under the mere pretence of having such authority.

This right to inquire by process of habeas corpus, and the duty of the officer to make a return, "grows necessarily," says Mr. Chief Justice Taney, "out of the complex character of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its power, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress."

Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in Ableman v. Booth, and The United States v. Booth, to cases where a prisoner is held in custody under undisputed lawful authority of

the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation. It would have been unnecessary to enforce, by any extended reasoning, such as the Chief Justice uses, the position that when it appeared to the judge or officer issuing the writ, that the prisoner was held under undisputed lawful authority, he should proceed no further. No Federal judge even could, in such case, release the party from imprisonment, except upon bail when that was allowable. The detention being by admitted lawful authority, no judge could set the prisoner at liberty, except in that way, at any stage of the proceeding. All that is meant by the language used is, that the State judge or State court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the Consitution and laws of the United States. If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.

This limitation upon the power of State tribunals and State officers furnishes no just ground to apprehend that the liberty of the citizen will thereby be endangered. The United States are as much interested in protecting the citizen from illegal restraint under their authority, as the several States are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression. Their courts and judicial officers are clothed with the power to issue the writ of habeas corpus in all cases, where a party is illegally restrained of his liberty by an officer of the United States, whether such illegality consist in the character of the process, the authority of the officer, or the invalidity of the law under which he is held. And there is no just reason to believe that they will exhibit any hesitation to exert their power, when it is properly invoked. Certainly there can be no ground for supposing that their action will be less prompt and efficient in such cases than would be that of State tribunals and State officers.[1]

It follows, from the views we have expressed, that the court commissioner of Dane County was without jurisdiction to issue the writ of habeas corpus for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States,

[1] In the matter of Severy, 4 Clifford. In the matter of Keeler, Hempstead, 306.

under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the National government; and the same information was imparted to the commissioner by the return of the officer. The commissioner was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no writ of habeas corpus issued by him could pass over the line which divided the two sovereignties.

The conclusion we have reached renders it unnecessary to consider how far the declaration of the prisoner as to his age, in the oath of enlistment, is to be deemed conclusive evidence on that point on the return to the writ. *Judgment reversed.*

The CHIEF JUSTICE, dissenting. I cannot concur in the opinion just read. I have no doubt of the right of a State court to inquire into the jurisdiction of a Federal court upon habeas corpus, and to discharge when satisfied that the petitioner for the writ is restrained of liberty by the sentence of a court without jurisdiction. If it errs in deciding the question of jurisdiction, the error must be corrected in the mode prescribed by the 25th section of the Judiciary Act; not by denial of the right to make inquiry.

I have still less doubt, if possible, that a writ of habeas corpus may issue from a State court to inquire into the validity of imprisonment or detention, without the sentence of any court whatever, by an officer of the United States. The State court may err; and if it does, the error may be corrected here. The mode has been prescribed and should be followed.

To deny the right of State courts to issue the writ, or, what amounts to the same thing, to concede the right to issue and to deny the right to adjudicate, is to deny the right to protect the citizen by habeas corpus against arbitrary imprisonment in a large number of cases; and, I am thoroughly persuaded, was never within the contemplation of the Convention which framed, or the people who adopted, the Constitution. That instrument expressly declares that "the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it."

Ex Parte SIEBOLD.

100 U. S., 371. Decided 1879.

Petition for writ of habeas corpus.

The facts are stated in the opinion of the court. . . .

Mr. Justice Bradley delivered the opinion of the court.

The petitioners in this case, Albert Siebold, Walter Tucker, Martin C. Burns, Lewis Coleman, and Henry Bowers, were judges of election at different voting precincts in the city of Baltimore, at the election held in that city, and in the State of Maryland, on the fifth day of November, 1878, at which representatives to the Forty-sixth Congress were voted for.

At the November Term of the Circuit Court of the United States for the District of Maryland, an indictment against each of the petitioners was found in said court, for offenses alleged to have been committed by them respectively at their respective precincts whilst being judges of election; and upon which indictments they were severally tried, convicted, and sentenced by said court to fine and imprisonment. They now apply to this court for a writ of habeas corpus to be relieved from imprisonment. . . .

These indictments were framed partly under Sect. 5515 and partly under Sect. 5522 of the Revised Statutes of the United States; and the principal questions raised by the application are, whether those sections, and certain sections of the title of the Revised Statutes relating to the elective franchise, which they are intended to enforce, are within the constitutional power of Congress to enact. If they are not, then it is contended that the Circuit Court has no jurisdiction of the cases, and that the convictions and sentences of imprisonment of the several petitioners were illegal and void. . . .

The peculiarity of the case consists in the concurrent authority of the two sovereignties, State and National, over the same subject-matter. This, however, is not entirely without a parallel. The regulation of foreign and interstate commerce is conferred by the Constitution upon Congress. It is not expressly taken away from the States. But where the subject matter is one of a national character, or one that requires a uniform rule, it has been held that the power of Congress is exclusive. On the contrary, where neither of these circumstances exist, it has been held that State regulations are not unconstitutional. In the absence of congressional regulation, which would be of paramount authority when adopted, they

are valid and binding. . . . [Here follows a discussion of Cooley v. Board of Wardens of Port of Philadelphia, 12 Howard, 299.]

So in the case of laws for regulating the elections of representatives to Congress. The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.

As to the supposed conflict that may arise between the officers appointed by the State and national governments for superintending the election, no more insuperable difficulty need arise than in the application of the regulations adopted by each respectively. The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the State. If both cannot be performed, the latter are *pro tanto* superseded and cease to be duties. If the power of Congress over the subject is supervisory and paramount, as we have seen it to be, and if officers or agents are created for carrying out its regulations, it follows as a necessary consequence that such officers and agents must have the requisite authority to act without obstruction or interference from the officers of the State. No greater subordination, in kind or degree, exists in this case than in any other. It exists to the same extent between the different officers appointed by the State, when the State alone regulates the election. One officer cannot interfere with the duties of another, or obstruct or hinder him in the performance of them. Where there is a disposition to act harmoniously, there is no danger of disturbance between those who have different duties to perform. When the rightful authority of the general government is once conceded and acquiesced in, the apprehended difficulties will disappear. Let a spirit of national as well as local patriotism once prevail, let unfounded jealousies cease, and we shall hear no more about the impossibility of harmonious action between the national and State governments in a matter in which they have a mutual interest.

As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments, for the enforcement of the duties required of the officers of election, and for

their protection in the performance of those duties, the same considerations apply. While the State will retain the power of enforcing such of its own regulations as are not superseded by those adopted by Congress, it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties; and if, as we have shown, Congress may revise existing regulations, and add to or alter the same as far as it deems expedient, there can be as little question that it may impose additional penalties for the prevention of frauds committed by the State officers in the elections, or for their violation of any duty relating thereto, whether arising from the common law or from any other law, State or national. Why not? Penalties for fraud and delinquency are part of the regulations belonging to the subject. If Congress, by its power to make or alter the regulations, has a general supervisory power over the whole subject, what is there to preclude it from imposing additional sanctions and penalties to prevent such fraud and delinquency?

It is objected that Congress has no power to enforce State laws or to punish State officers, and especially has no power to punish them for violating the laws of their own State. As a general proposition, this is undoubtedly true; but when, in the performance of their functions, State officers are called upon to fulfill duties which they owe to the United States as well as to the State, has the former no means of compelling such fulfilment? Yet that is the case here. It is the duty of the States to elect representatives to Congress. The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed character of the transaction, State and national. A violation of duty is an offense against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a

representative owes no duty to the national government which Congress can enforce; or that an officer who stuffs the ballot-box cannot be made amenable to the United States. If Congress has not, prior to the passage of the present laws, imposed any penalties to prevent and punish frauds and violations of duty committed by officers of election, it has been because the exigency has not been deemed sufficient to require it, and not because Congress had not the requisite power.

The objection that the laws and regulations, the violation of which is made punishable by the acts of Congress, are State laws, and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by State laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfillment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations.

That the duties devolved on the officers of election are duties which they owe to the United States as well as to the State, is further evinced by the fact that they have always been so regarded by the House of Representatives itself. In most cases of contested elections, the conduct of these officers is examined and scrutinized by that body as a matter of right; and their failure to perform their duties is often made the ground of decision. Their conduct is justly regarded as subject to the fullest exposure; and the right to examine them personally, and to inspect all their proceedings and papers, has always been maintained. This could not be done, if the officers were amenable only to the supervision of the State government which appointed them.

Another objection made is, that, if Congress can impose penalties for violation of State laws, the officer will be made liable to double punishment for delinquency,—at the suit of the State, and at the suit of the United States. But the answer to this is, that each government punishes for violation of duty to itself only. Where a person owes a duty to two sovereigns, he is amen-

able to both for its performance; and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act, need not now be decided; although considerable discussion bearing upon the subject has taken place in this court, tending to the conclusion that such a plea cannot be sustained.

In reference to a conviction under a State law for passing counterfeit coin, which was sought to be reversed on the ground that Congress had jurisdiction over that subject, and might inflict punishment for the same offense, Mr. Justice Daniel, speaking for the court, said: "It is almost certain that, in the benignant spirit in which the institutions both of the State and Federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same,—unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But, were a contrary course of policy or action either probable or usual, this would by no means justify the conclusion that offenses falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration." Fox v. The State of Ohio, 5 How., 410. The same judge, delivering the opinion of the court in the case of United States v. Marigold (9 How., 569) where a conviction was had under an act of Congress for bringing counterfeit coin into the country, said, in reference to Fox's Case: "With the view of avoiding conflict between the State and Federal jurisdictions, this court, in the case of Fox v. State of Ohio, have taken care to point out that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We hold this distinction sound;" and the conviction was sustained. The subject came up again for discussion in the case of Moore v. State of Illinois (14 id., 13), in which the plaintiff in error had been convicted under a State law for harboring and secreting a negro slave, which was contended to be properly an offense against the United States under the fugitive-slave law of 1793, and not an offense against the State. The objection of double punishment was again raised. Mr. Justice Grier, for the court, said: "Every citizen of the United States is also a citizen of a State or a Ter-

ritory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both." Substantially the same views are expressed in United States v. Cruikshank (92 U. S., 542), referring to these cases; and we do not well see how the doctrine they contain can be controverted. A variety of instances may be readily suggested, in which it would be necessary or proper to apply it. Suppose, for example, a State judge having power under the naturalization laws to admit aliens to citizenship should utter false certificates of naturalization, can it be doubted that he could be indicted under the act of Congress providing penalties for that offense, even though he might also, under the State laws, be indictable for forgery, as well as liable to impeachment? So, if Congress, as it might, should pass a law fixing the standard of weights and measures, and imposing a penalty for sealing false weights and false measures, but leaving to the States the matter of inspecting and sealing those used by the people, would not an offender, filling the office of sealer under a State law, be amenable to the United States as well as to the State?

If the officers of election, in elections for representatives, owe a duty to the United States, and are amenable to that government as well as to the State,—as we think they are,—then, according to the cases just cited, there is no reason why each should not establish sanctions for the performance of the duty owed to itself, though referring to the same act.

To maintain the contrary proposition, the case of Commonwealth of Kentucky v. Dennison (24 How., 66) is confidently relied on by the petitioners' counsel. But there, Congress had imposed a duty upon the governor of the State which it had no authority to impose. The enforcement of the clause in the Constitution requiring the delivery of fugitives from service was held to belong to the government of the United States, to be effected by its own agents; and Congress had no authority to require the governor of a State to execute this duty.

We have thus gone over the principal reasons of a special character relied on by the petitioners for maintaining the general proposition for which they contend; namely, that in the regulation of elections for representatives the national and State governments cannot co-operate, but must act exclusively of each other; so that, if Congress assumes to regulate the subject at all, it must assume exclusive control of the whole subject. The more general reason assigned, to wit, that the nature of sovereignty

is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the national and State governments in the election of representatives. It is at most an argument *ab inconveniente*. There is nothing in the Constitution to forbid such co-operation in this case. On the contrary, as already said, we think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such co-operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State. If the two governments had an entire equality of jurisdiction, there might be an intrinsic difficulty in such co-operation. Then the adoption by the State government of a system of regulations might exclude the action of Congress. By first taking jurisdiction of the subject, the State would acquire exclusive jurisdiction in virtue of a well-known principle applicable to courts having co-ordinate jurisdiction over the same matter. But no such equality exists in the present case. The power of Congress, as we have seen, is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.

As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of State sovereignty. The Constitution and laws of the United States are the supreme laws of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity. There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the State and national sovereignties. Generally, the powers given by the Constitution to the government of the United States are given over distinct branches of sovereignty from which the State governments, either expressly or by necessary implication, are excluded. But in this case, expressly, and in some others, by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated, that of the State, however, being

subordinate to that of the United States, whereby all questions of precedency is eliminated.

In what we have said, it must be remembered that we are dealing only with the subject of elections of representatives to Congress. If for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of State or county officers, they will be amenable to Federal jurisdiction; nor do we understand that the enactments of Congress now under consideration have any application to such acts.

It must also be remembered that we are dealing with the question of power, not of the expediency of any regulations which Congress has made. That is not within the pale of our jurisdiction. In exercising the power, however, we are bound to presume that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with State laws and regulations, with the duties of State officers, or with local prejudices. It could not act at all so as to accomplish any beneficial object in preventing frauds and violence, and securing the faithful performance of duty at the elections, without providing for the presence of officers and agents to carry its regulations into effect. It is also difficult to see how it could attain these objects without imposing proper sanctions and penalties against offenders.

The views we have expressed seem to us to be founded on such plain and practical principles as hardly to need any labored argument in their support. We may mystify anything. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.

The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard to the relations which subsist between the State and national governments. It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is. Whenever the true conception of the nature of this

government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation of our liberties, than is proper to be exercised towards the State governments. Its powers are limited in number, and clearly defined; and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the national and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other.

Several other questions bearing upon the present controversy have been raised by the counsel of the petitioners. Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the State authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

This power to enforce its laws and to execute its functions in all places does not derogate from the powers of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be

executed at the same time. In that case, the words of the Constitution itself show which is to yield. "This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land."

This concurrent jurisdiction which the national government necessarily possesses to exercise its powers of sovereignty in all parts of the United States is distinct from that exclusive power which, by the first article of the Constitution, it is authorized to exercise over the District of Columbia, and over those places within a State which are purchased by consent of the legislature thereof, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. There its jurisdiction is absolutely exclusive of that of the State, unless, as is sometimes stipulated, power is given to the latter to serve the ordinary process of its courts in the precinct acquired.

Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified.

Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation.

The argument is based on a strained and impracticable view of the nature and powers of the national government. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction. Without specifying other instances in which this power to preserve order and keep the peace unquestionably exists, take the very case in hand. The counsel for the petitioners concede that Congress may,

if it sees fit, assume the entire control and regulation of the election of representatives. This would necessarily involve the appointment of the places for holding the polls, the times of voting, and the officers for holding the election; it would require the regulation of the duties to be performed, the custody of the ballots, the mode of ascertaining the result, and every other matter relating to the subject. Is it possible that Congress could not, in that case, provide for keeping the peace at such elections, and for arresting and punishing those guilty of breaking it? If it could not, its power would be but a shadow and a name. But, if Congress can do this, where is the difference in principle in its making provision for securing the preservation of the peace, so as to give to every citizen his free right to vote without molestation or injury, when it assumes only to supervise the regulations made by the State, and not to supersede them entirely? In our judgment, there is no difference; and, if the power exists in the one case, it exists in the other.

The next point raised is, that the act of Congress proposes to operate on officers or persons authorized by State laws to perform certain duties under them, and to require them to disobey and disregard State laws when they come in conflict with the act of Congress; that it thereby of necessity produces collision, and is therefore void. This point has been already fully considered. We have shown, as we think, that, where the regulations of Congress conflict with those of the State, it is the latter which are void, and not the regulations of Congress; and that the laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws. . . .

The doctrine laid down at the close of counsel's brief, that the State and national governments are co-ordinate and altogether equal, on which their whole argument, indeed, is based, is only partially true.

The true doctrine, as we conceive, is this, that whilst the States are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Constitution and constitutional laws of the latter are, as we have already said, the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation. This is the fundamental principle on which the authority of the Constitution is based; and unless it be conceded in practice, as well as theory, the fabric of our institutions, as it was contemplated by its founders, cannot stand. The questions involved have respect not more to the autonomy and existence of the States,

than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land.

We think that the cause of commitment in these cases was lawful, and that the application for the writ of habeas corpus must be denied.

Application denied.

MR. JUSTICE CLIFFORD and MR. JUSTICE FIELD dissented.

NOTE.—Questions as to the relation of the Federal Government and the States have arisen most frequently in connection with the judicial power, taxation, and the regulation of commerce. On this point the cases included in chapters IV and XIV should be consulted, as well as the following cases under taxation (chap. II): McCulloch v. Maryland, Weston v. Charleston, License Tax Cases, and The Collector v. Day. Under the executive power see In re Neagle, and for a general discussion see Barron v. Baltimore. Among the many valuable discussions in periodicals the following are noteworthy: "The American Commonwealth: Changes in Its Relation to the Nation," by Prof. John W. Burgess, Political Science Quarterly, I, 9 (1886); "Are the States Equal Under the Constitution?" by Prof. Wm. A. Dunning, Ibid., III, 425 (1888); "Recent Centralizing Tendencies in the Supreme Court," by F. P. Powers, Ibid., V, 389 (1890); "A New Nation," by H. R. Bailey, Harvard Law Review, IX, 309 (1895).

XIII. INTERNATIONAL RELATIONS.—INDIAN AFFAIRS

In The American Insurance Company v. Canter, 1 Peters, 511 (1828), Chief Justice Marshall said:

"The course which the argument has taken, will require that, in deciding this question, the court should take into view the relation in which Florida stands to the United States.

"The constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly created power of the state.

"On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession,[1] contains the following provision: "The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may

[1] 8 Stats. at Large, 252.

be consistent with the principles of the federal constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

"This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime, Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution which empowers congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

"Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, congress, in 1822, passed "an act for the establishment of a territorial government in Florida,"[2] and on the 3d of March, 1823, passed another act to amend the act of 1822. Under this act, the territorial legislature enacted the law now under consideration. . . ."

THE CHEROKEE NATION v. THE STATE OF GEORGIA.

5 Peters, 1. Decided 1831.

This was an original bill filed in this court by the Cherokee Nation against the State of Georgia, and also a supplemental bill by the same complainant against the same defendant, upon which the complainant moved for a subpœna to the State, and also for a temporary injunction to restrain the State from enforcing the laws of Georgia within the territory alleged to belong exclusively to the complainants. As the decision of the court rested solely on the ground of want of jurisdiction, it is not deemed necessary to

[2] 3 Stats. at Large, 654.

state the contents of the bills, any further than they bear on that question.

The bill set forth the complainants to be "the Cherokee Nation of Indians, a foreign state, not owing allegiance to the United States, nor to any State of this Union, nor to any prince, potentate, or state, other than their own."

"That from time immemorial, the Cherokee Nation have composed a sovereign and independent state, and in this character have been repeatedly recognized, and still stand recognized, by the United States, in the various treaties subsisting between their nation and the United States." And it proceeds to state when these were made, and their substance, and shows how certain laws of Georgia are repugnant thereto.

On the day appointed for the hearing, the counsel for the complainants filed a supplemental bill, which states that since their bill, now submitted, was drawn, acts, demonstrative of the determination of the State of Georgia to enforce her assumed authority over the complainants and their territory, property, and jurisdiction, have taken place, and it sets out those acts. . . .

No counsel appeared for the State of Georgia.

MARSHALL, C. J., delivered the opinion of the court.

This bill is brought by the Cherokee nation, praying an injunction to restrain the State of Georgia from the execution of certain laws of that State, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force. . . .

Before we can look into the merits of the case, a preliminary inquiry presents itself. Has this court jurisdiction of the cause?

The 3d article of the constitution describes the extent of the judicial power. The 2d section closes an enumeration of the cases to which it is extended, with "controversies" "between a State or the citizens thereof and foreign states, citizens, or subjects." A subsequent clause of the same section gives the supreme court original jurisdiction in all cases in which a State shall be a party. The party defendant may, then, unquestionably be sued in this court. May the plaintiff sue in it? Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution?

The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much

of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made by them with the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

A question of much more difficulty remains. Do the Cherokees constitute a foreign state in the sense of the constitution?

The counsel have shown conclusively that they are not a State of the Union, and have insisted that individually they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state. Each individual being foreign, the whole must be foreign.

This argument is imposing, but we must examine it more closely before we yield to it. The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term foreign nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

The Indian territory is admitted to form a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell,[1] which preceded the constitution, "to send a deputy of their choice, when-

[1] 7 Statutes at Large, 18.

ever they think proper, to congress." Treaties were made with some tribes by the State of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that State, taking back a limited grant to themselves, in which they admit their dependence.

Though the Indians are acknowledged to have an unquestionable, and, therefore, unquestioned right to the land they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.

These considerations go far to support the opinion that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the Union to controversies between a State or the citizens thereof and foreign states.

In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbors, ought not to be entirely disregarded. At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had, perhaps, never entered the mind of an Indian or his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union. Be this as it may, the peculiar relations between the United States and the Indians occupying our territory are such, that we should feel much difficulty in considering them as designated by the term foreign state, were there no other part of the constitution which might shed light on

the meaning of these words. But we think that in construing them, considerable aid is furnished by that clause in the 8th section of the 1st article, which empowers congress to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several States composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several States, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption.

The counsel for the plaintiffs contend that the words "Indian tribes" were introduced into the article empowering congress to regulate commerce, for the purpose of removing those doubts in which the management of Indian affairs was involved by the language of the 9th article of the confederation. Intending to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly, and omitted those qualifications which embarrassed the exercise of it as granted in the confederation. This may be admitted without weakening the construction which has been intimated. Had the Indian tribes been foreign nations, in the view of the convention, this exclusive power of regulating intercourse with them might have been, and most probably would have been, specifically given, in language indicating that idea, not in language contradistinguishing them from foreign nations. Congress might have been empowered "to regulate commerce with foreign nations, including the Indian tribes, and among the several States." This language would have suggested itself to statesmen who considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly.

It has also been said that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument; their meaning is controlled by the context. This is undoubtedly true. In common language, the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. This may

not be equally true with respect to proper names. Foreign nations, is a general term, the application of which to Indian tribes, when used in the American constitution, is at best extremely questionable. In one article, in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate in terms clearly contradistinguishing them from each other. We perceive plainly that the constitution, in this article, does not comprehend Indian tribes in the general term "foreign nations;" not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term "foreign states" is introduced, we cannot impute to the convention the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context force that construction upon us. We find nothing in the context, and nothing in the subject of the article, which leads to it.

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state, in the sense of the constitution, and cannot maintain an action in the courts of the United States.

A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a State from the forcible exercise of legislative power over a neighboring people, asserting their independence; their right to which the State denies. On several of the matters alleged in the bill, for example on the laws making it criminal to exercise the usual powers of self-government in their own country by the Cherokee nation, this court cannot interpose; at least in the form in which those matters are presented.

That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties, makes it unnecessary to decide this question.

If it be true that the Cherokee nation have rights, this is not

the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.

The motion for an injunction is denied.

[JUSTICES JOHNSON and BALDWIN delivered long concurring opinions. JUSTICE THOMPSON delivered a dissenting opinion, in which JUSTICE STORY concurred.]

NOTE.—"The political importance of the Cherokee case lay in the fact that its result was the first successful nullification, in its modern sense, of the laws of the United States." Alexander Johnston in Lalor's Cyclopedia, I, 394.

WORCESTER v. THE STATE OF GEORGIA.

6 Peters, 515. Decided 1832.

Error to the superior court for the county of Gwinnett in the State of Georgia. . . . [The plaintiff in error, a missionary from Vermont, residing within the limits of the Cherokee nation by permission of the United States, was arrested and sentenced to imprisonment under a law of the State of Georgia forbidding such residence without a license from the State.]

MARSHALL, C. J., delivered the opinion of the court.

This cause, in every point of view in which it can be placed, is of the deepest interest.

The defendant is a State, a member of the Union, which has exercised the powers of government over a people, who deny its jurisdiction, and are under the protection of the United States.

The plaintiff is a citizen of the State of Vermont, condemned to hard labor for four years in the penitentiary of Georgia under color of an act which he alleges to be repugnant to the constitution, laws and treaties of the United States.

The legislative power of a State, the controlling power of the constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered. . . . [The first part of the opinion consists

of a consideration of the jurisdiction of the court and a discussion of the relations of the Indian tribes with the governments of Great Britain, the Colonies and the United States.]

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union.

Is this the rightful exercise of power, or is it usurpation?

While these States were colonies, this power, in its utmost extent, was admitted to reside in the crown. When our revolutionary struggle commenced, congress was composed of an assemblage of deputies acting under specific powers granted by the legislatures, or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those who were intrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all: congress, therefore, was considered as invested with all the powers of war and peace, and congress dissolved our connection with the mother country, and declared these united colonies to be independent States. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, congress assumed the management of Indian affairs; first in the name of these united colonies; and, afterwards, in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on under the direction, and with the forces of the United States, and the efforts to make peace, by treaty, were earnest and incessant. The confederation found congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.

Such was the state of things when the confederation was adopted. That instrument surrendered the powers of peace and war to congress, and prohibited them to the States, respectively, unless a State be actually invaded, "or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of delay till the United States in congress assembled can be consulted." This

instrument also gave the United States in congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians, not members of any of the States: provided, that the legislative power of any State within its own limits be not infringed or violated."

The ambiguous phrases which follow the grant of power to the United States were so construed by the States of North Carolina and Georgia as to annul the power itself. The discontents and confusion resulting from these conflicting claims, produced representations to congress, which were referred to a committee, who made their report in 1787. The report does not assent to the construction of the two States, but recommends an accommodation, by liberal cessions of territory, or by an admission, on their part, of the powers claimed by congress. The correct exposition of this article is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Georgia, herself, has furnished conclusive evidence that her former opinions on this subject concurred with those entertained

by her sister States, and by the government of the United States. Various acts of her legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent; that their territory was separated from that of any State within whose chartered limits they might reside, by a boundary line, established by treaties; that, within their boundary, they possessed rights with which no State could interfere; and that the whole power of regulating the intercourse with them, was vested in the United States. A review of these acts, on the part of Georgia, would occupy too much time, and is the less necessary, because they have been accurately detailed in the argument at the bar. Her new series of laws, manifesting her abandonment of these opinions, appears to have commenced in December, 1828.

In opposition to this original right, possessed by the undisputed occupants of every country; to this recognition of that right, which is evidenced by our history, in every change through which we have passed; is placed the charters granted by the monarch of a distant and distinct region, parcelling out a territory in possession of others whom he could not remove and did not attempt to remove, and the cession made of his claims by the treaty of peace.

The actual state of things at the time, and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right of self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state." At the present day, more than one state

may be considered as holding its right of self-government under the guarantee and protection of one or more allies.

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

The act of the State of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity. Can this court revise and reverse it?

If the objection to the system of legislation, lately adopted by the legislature of Georgia, in relation to the Cherokee nation, was confined to its extra-territorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject. But it goes much further. If the review which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the constitution, laws, and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the Union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia, guarantee to them all the land within their boundary, solemnly pledge the faith of the United States to restrain their citizens from trespassing on it, and recognize the pre-existing power of the nation to govern itself.

They are in equal hostility with the acts of congress for regulating this intercourse, and giving effect to the treaties.

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation with its permission, and by authority of the President of the United States, is also a violation of the acts which authorize the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized, and forcibly carried away, while under guardianship of treaties guaranteeing the country in which he resided, and taking it under the protection of the United States. He was seized while performing, under the sanction of the chief magistrate of the Union, those duties which the humane

policy adopted by congress had recommended. He was apprehended, tried, and condemned, under color of a law which has been shown to be repugnant to the constitution, laws, and treaties of the United States. Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment, if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the constitution, laws, and treaties of his country.

This point has been elaborately argued and, after deliberate consideration, decided, in the case of Cohens v. The Commonwealth of Virginia, 6 Wheat., 264.

It is the opinion of this court that the judgment of the superior court for the county of Gwinnett, in the State of Georgia, condemning Samuel A. Worcester to hard labor, in the penitentiary of the State of Georgia, for four years, was pronounced by that court under color of a law which is void, as being repugnant to the constitution, treaties, and laws of the United States, and ought, therefore, to be reversed and annulled.

[JUSTICES MCLEAN and WASHINGTON delivered concurring opinions, and JUSTICE BALDWIN rendered a dissenting opinion.]

FONG YUE TING v. UNITED STATES.
WONG QUAN v. UNITED STATES.
LEE JOE v. UNITED STATES.

149 U. S., 698. Decided 1893.

These were three writs of habeas corpus, granted by the Circuit Court of the United States, for the Southern District of New York, upon petitions of Chinese laborers, arrested and held by the marshal of the district for not having certificates of residence, under section 6 of the act of May 5, 1892, c. 60, which is copied in the margin. . . .

Each petition alleged that the petitioner was arrested and detained without due process of law, and that section 6 of the act of

May 5, 1892, was unconstitutional and void. [The section complained of required Chinese laborers within the limits of the United States at the time of the passage of the act to take out certificates of residence. Those who neglected to do so within one year without good cause were made liable to deportation.]

In each case, the Circuit Court, after a hearing upon the writ of habeas corpus and the return of the marshal, dismissed the writ of habeas corpus, and allowed an appeal of the petitioner to this court, and admitted him to bail pending the appeal. . . .

Mr. Justice Gray, after stating the facts, delivered the opinion of the court.

The general principles of public law which lie at the foundation of these cases are clearly established by previous judgments of this court, and by the authorities therein referred to.

In the recent case of Nishimura Ekiu v. United States, 142 U. S., 651, 659, the court, in sustaining the action of the executive department, putting in force an act of Congress for the exclusion of aliens, said: "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress."

The same views were more fully expounded in the earlier case of Chae Chan Ping v. United States, 130 U. S., 581, in which the validity of a former act of Congress, excluding Chinese laborers from the United States, under the circumstances therein stated, was affirmed.

In the elaborate opinion delivered by Mr. Justice Field, in behalf of the court, it was said: "Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." "The

United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." 130 U. S., 603, 604.

It was also said, repeating the language of Mr. Justice Bradley in Knox v. Lee, 12 Wall., 457, 555: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments." 130 U. S., 605. And it was added: "For local interests the several States of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." 130 U. S., 606.

The court then went on to say: "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, is necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases, its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government, or resort to any other measures which, in its judgment, its interests or dignity may demand; and

there lies its only remedy. The power of the government to exclude foreigners from the country, whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments." 130 U. S., 606, 607. This statement was supported by many citations from the diplomatic correspondence of successive Secretaries of State, collected in Wharton's International Law Digest, § 206.

The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.

This is clearly affirmed in dispatches referred to by the court in Chae Chan Ping's Case. In 1856, Mr. Marcy wrote: "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war. A memorable example of the exercise of this power in time of peace was the passage of the alien law of the United States in the year 1798." In 1869, Mr. Fish wrote: "The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested." Wharton's International Law Digest, § 206; 130 U. S., 607. . .

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare, the question now before the court is whether the manner in which Congress has exercised this right in sections 6 and 7 of the act of 1892 is consistent with the Constitution.

The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States.

The Constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made

him the commander-in-chief of the army and navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. The Constitution has granted to Congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. And the several States are expressly forbidden to enter into any treaty, alliance, or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another State, or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

In exercising the great power which the people of the United States, by establishing a written constitution as the supreme and paramount law, have vested in this court, of determining, whenever the question is properly brought before it, whether the acts of the legislature or of the executive are consistent with the Constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government.

As long ago said by Chief Justice Marshall, and since constantly maintained by this court: "The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." "Where the law is not prohibited, and is really calculated

to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power." McCulloch v. Maryland, 4 Wheat., 316, 421, 423; Juilliard v. Greenman, 110 U. S., 421, 440, 450; Ex parte Yarbrough, 110 U. S., 651, 658; In re Rapier, 143 U. S., 110, 134; Logan v. United States, 144 U. S., 263, 283.

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

In Nishimura Ekiu's Case, it was adjudged that, although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might intrust the final determination of those facts to an executive officer, and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency. 142 U. S., 660.

The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.

The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend.

Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides. . . .

In our jurisprudence, it is well settled that the provisions of an act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations

in an earlier treaty. As was said by this court in Chae Chan Ping's Case, following previous decisions: "The treaties were of no greater legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case, the last expression of the sovereign will must control." "So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal." 130 U. S., 600. See also Foster v. Neilson, 2 Pet., 253, 314; Edye v. Robertson, 112 U. S., 580, 597-599; Whitney v. Robertson, 124 U. S., 190.

By the supplementary act of October 1, 1888, c. 1064, it was enacted, in section 1, that "from and after the passage of this act, it shall be unlawful for any Chinese laborer, who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed or shall depart therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States;" and in section 2, that "no certificates of identity, provided for in the fourth and fifth sections of the act to which this is a supplement, shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States." 25 Stat., 504. . . . [Here follows a statement and discussion of Chae Chan Ping v. United States, 130 U. S., 581.]

By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicil there; and, while they are permitted by the nation to retain such a residence and domicil, are subject to its laws, and may invoke its protection against other nations. This is recognized by those publicists who, as has been seen, maintain in the strongest terms the right of the nation to

expel any or all aliens at its pleasure. Vattel, lib. 1, c. 19 § 213; 1 Phillimore, c. 18 § 321; Mr. Marcy, in Koszta's Case, Wharton's International Law Digest, § 198. See also Lau Ow Bew v. United States, 144 U. S., 47, 62; Merlin, Repertoire de Jurisprudence, Domicile, § 13, quoted in the case, above cited, of In re Adam, 1 Moore, P, C., 460, 472, 473.

Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest. . . .

The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.

Upon careful consideration of the subject, the only conclusion which appears to us to be consistent with the principles of international law, with the Constitution and laws of the United States, and with the previous decisions of this court, is that in each of these cases the judgment of the Circuit Court, dismissing the writ of habeas corpus, is right and must be *Affirmed.*

[Chief Justice Fuller, Justice Brewer, and Justice Field rendered dissenting opinions.]

XIV. JURISDICTION OF THE FEDERAL COURTS.

CHISHOLM, EXECUTOR, v. GEORGIA.

2 Dallas, 419. Decided 1793.

[Chisholm, executor, brought an action of assumpsit against the State of Georgia. Return having been made, Attorney-General Randolph moved that unless the State of Georgia should cause an appearance to be made in its behalf, judgment should be entered against the said State and a writ of inquiry of damages be awarded. When the case came before the court for consideration, the counsel for the State of Georgia made a protest in writing against the court's taking jurisdiction of the case, but declined to take any part in arguing the question. The judges delivered their opinions *seriatim.*]

WILSON, J. This is a case of uncommon magnitude. One of the parties to it is a State; certainly respectable, claiming to be sovereign. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others more important still; and may perhaps be ultimately resolved into one no less radical than this—"Do the people of the United States form a Nation?"

A cause so conspicuous and interesting, should be carefully and accurately viewed from every possible point of sight. I shall examine it, 1st. By the principles of general jurisprudence. 2d. By the laws and practice of particular states and kingdoms. From the law of nations little or no illustration of this subject can be expected. By that law the several states and governments spread over our globe are considered as forming a society, not a nation. It has only been by a very few comprehensive minds, such as those of Elizabeth and the Fourth Henry, that this last great idea has been even contemplated. 3dly, and chiefly, I shall examine the important question before us, by the constitution of the United

States, and the legitimate result of that valuable instrument. . . .

III. I am, thirdly and chiefly, to examine the important question now before us, by the constitution of the United States, and the legitimate result of that valuable instrument. Under this view the question is naturally subdivided into two others. 1. Could the constitution of the United States vest a jurisdiction over the State of Georgia? 2. Has that constitution vested such jurisdiction in this court? . . .

Concerning the prerogative of kings, and concerning the sovereignty of States, much has been said and written; but little has been said and written concerning a subject much more dignified and important, the majesty of the people. . . . The well-known address used by Demosthenes, when he harangued and animated his assembled countrymen, was, "O men of Athens." With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object which the nation could present. "The people of the United States" are the first personages introduced. Who were those people? They were the citizens of thirteen States, each of which had a separate constitution and government, and all of which were connected together by articles of confederation. To the purposes of public strength and felicity that confederacy was totally inadequate. A requisition on the several States terminated its legislative authority; executive or judicial authority it had none. In order, therefore, to form a more perfect union, to establish justice, to insure domestic tranquillity, to provide for the common defense, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present constitution. By that constitution legislative power is vested, executive power is vested, judicial power is vested.

The question now fairly opens to our view, could the people of those States, among whom were those of Georgia, bind those States, and Georgia among the others, by the legislative, executive, and judicial power so vested? If the principles on which I have founded myself are just and true, this question must, unavoidably, receive an affirmative answer. If those States were the work of those people, those people, and that I may apply the case closely, the people of Georgia, in particular, could alter, as they pleased, their former work; to any given degree, they could diminish as well as enlarge it. Any or all of the former State powers they could extinguish or transfer. The inference which necessarily results is, that the constitution ordained and established by those

people, and still closely to apply the case, in particular by the people of Georgia, could vest jurisdiction or judicial power over those States and over the State of Georgia in particular.

The next question under this head, is, Has the constitution done so? Did those people mean to exercise this their undoubted power? These questions may be resolved, either by fair and conclusive deductions, or by direct and explicit declarations. In order, ultimately to discover whether the people of the United States intended to bind those States by the judicial power vested by the national constitution, a previous inquiry will naturally be, did those people intend to bind those States by the legislative power vested by that constitution? The articles of confederation, it is well known, did not operate upon individual citizens; but operated only upon States. This defect was remedied by the national constitution, which, as all allow, has an operation on individual citizens. But if an opinion, which some seem to entertain, be just, the defect remedied on one side was balanced by a defect introduced on the other; for they seem to think that the present constitution operates only on individual citizens, and not on States. This opinion, however, appears to be altogether unfounded. When certain laws of the States are declared to be "subject to the revision and control of the Congress,"[1] it cannot, surely, be contended that the legislative power of the national government was meant to have no operation on the several States. The fact uncontrovertibly established in one instance, proves the principle in all other instances to which the facts will be found to apply. We may then infer that the people of the United States intended to bind the several States by the legislative power of the national government.

In order to make the discovery, at which we ultimately aim, a second previous inquiry will naturally be, Did the people of the United States intend to bind the several States by the executive power of the national government? The affirmative answer to the former question directs, unavoidably, an affirmative answer to this. Ever since the time of Bracton, his maxim, I believe, has been deemed a good one—"*Supervacuum esset leges condere, nisi esset qui leges tueretur.*"[2] "It would be superfluous to make laws, unless those laws, when made, were to be enforced." When the laws are plain, and the application of them is uncontroverted, they are enforced immediately by the executive authority of government. When the application of them is doubtful or intricate, the inter-

[1] Art. 1, s. 10. [2] 1 Brac., 107.

position of the judicial authority becomes necessary. The same principle, therefore, which directed us from the first to the second step, will direct us to the third and last step of our deduction. Fair and conclusive deduction, then, evinces that the people of the United States did vest this court with jurisdiction over the State of Georgia. The same truth may be deduced from the declared objects and the general texture of the constitution of the United States. One of its declared objects is, to form a union more perfect than, before that time, had been formed. Before that time the Union possessed legislative, but unenforced legislative power over the States. Nothing could be more natural than to intend that this legislative power should be enforced by powers executive and judicial. Another declared object is "to establish justice." This points, in a particular manner, to the judicial authority. And when we view this object in conjunction with the declaration, "that no State shall pass a law impairing the obligation of contracts," we shall probably think that this object points, in a particular manner, to the jurisdiction of the court over the several States. What good purpose could this constitutional provision secure if a State might pass a law impairing the obligation of its own contracts, and be amenable, for such a violation of right, to no controlling judiciary power? We have seen, that on principles of general jurisprudence, a State, for the breach of a contract, may be liable for damages. A third declared object is, "to insure domestic tranquillity." This tranquillity is most likely to be disturbed by controversies between States. These consequences will be most peaceably and effectually decided by the establishment and by the exercise of a superintending judicial authority. By such exercise and establishment, the law of nations—the rule between contending States—will be enforced among the several States in the same manner as municipal law.

Whoever considers, in a combined and comprehensive view, the general texture of the constitution, will be satisfied that the people of the United States intended to form themselves into a nation for national purposes. They instituted, for such purposes, a national government complete in all its parts, with powers legislative, executive and judiciary; and in all those powers extending over the whole nation. Is it congruous that, with regard to such purposes, any man or body of men, any person, natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national government? Would not such claims, crowned with success, be repugnant to our very existence as a nation? When so many trains of deduction, coming

from different quarters, converge and unite at last in the same point, we may safely conclude, as the legitimate result of this constitution, that the State of Georgia is amenable to the jurisdiction of this court.

But, in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the constitution; it is confirmed, beyond all doubt, by the direct and explicit declaration of the constitution itself. "The judicial power of the United States shall extend to controversies between two States."[1] Two States are supposed to have a controversy between them; this controversy is supposed to be brought before those vested with the judicial power of the United States; can the most consummate degree of professional ingenuity devise a mode by which this "controversy between two States" can be brought before a court of law, and yet neither of those States be a defendant? "The judicial power of the United States shall extend to controversies between a State and citizens of another State." Could the strictest legal language; could even that language which is peculiarly appropriated to an act, deemed by a great master to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriated language describe with more precise accuracy the cause now depending before the tribunal? Causes, and not parties to causes, are weighed by justice in her equal scales; on the former, solely, her attention is fixed; to the latter she is, as she is painted, blind.

I have now tried this question by all the touchstones to which I proposed to apply it. I have examined it by the principles of general jurisprudence; by the laws and practice of States and kingdoms; and by the constitution of the United States. From all, the combined inference is, that the action lies.

Cushing, J. The grand and principal question, in this case, is whether a State can, by the federal constitution, be sued by an individual citizen of another State. The point turns not upon the law or practice of England, although perhaps it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the constitution established by the people of the United States; and particularly upon the extent of powers given to the federal judiciary in the 2d section of the 3d article of the constitution. It is declared that "the judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, or treaties made or which shall be made under their authority: to all cases affecting ambassa-

[1] Art. 3, s. 2.

dors or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, and citizens of another State; between citizens of different States; between citizens of the same States claiming lands under grants of different States; and between a State and citizens thereof and foreign States, citizens or subjects." The judicial power, then, is expressly extended to "controversies between a State and citizens of another State." When a citizen makes a demand against a State of which he is not a citizen, it is as really a controversy between a State and a citizen of another State, as if such State made a demand against such citizen. The case then seems clearly to fall within the letter of the constitution. It may be suggested that it could not be intended to subject a State to be a defendant, because it would affect the sovereignty of States. If that be the case, what shall we do with the immediate preceding clause: "controversies between two or more States," where a State must of necessity be a defendant? If it was not the intent, in the very next clause also, that a State might be made defendant, why was it so expressed as naturally to lead to and comprehend that idea? Why was not an exception made if one was intended?

Again, what are we to do with the last clause of the section of judicial powers, namely, "controversies between a State or the citizens thereof and foreign States or citizens"? Here, again, States must be suable or liable to be made defendants by this clause, which has a similar mode of language with the two other clauses I have remarked upon. For if the judicial power extends to a controversy between one of the United States and a foreign State, as the clause expresses, one of them must be defendant. And then what becomes of sovereignty of States, as far as suing affects it? But although the words appear reciprocally to affect the State here and a foreign State, and put them on the same footing as far as may be, yet ingenuity may say that the State here may sue, but cannot be sued; but that the foreign State may be sued, but cannot sue. We may touch foreign sovereignties, but not our own. But I conceive the reason of the thing as well as the words of the constitution, tend to show that the federal judicial power extends to a suit brought by a foreign State, against any one of the United States. One design of the general government was for managing the great affairs of peace and war, and the general defense, which were impossible to be conducted by the States separately. Incident to these powers, and for preventing controversies between foreign powers, or citizens from rising to extremities and

to an appeal to the sword, a national tribunal was necessary, amicably, to decide them, and thus ward off such fatal public calamity. Thus States at home and their citizens, and foreign States and their citizens, are put together without distinction upon the same footing, as far as may be, as to controversies between them. So also with respect to controversies between a State and citizens of another State at home, comparing all the clauses together the remedy is reciprocal; the claim to justice equal. As controversies between State and State, and between a State and citizens of another State might tend gradually to involve States in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such controversies, and preserve peace and friendship. Further: if a State is entitled to justice in the federal court, against a citizen of another State, why not such citizen against the State, when the same language equally comprehends both? The rights of individuals and the justice due to them are as dear and precious as those of States. Indeed the latter are founded upon the former, and the great end and object of them must be to secure and support the rights of individuals, or else vain is government.

But still it may be insisted that this will reduce States to mere corporations, and take away all sovereignty. As to corporations, all States whatever are corporations or bodies politic. The only question is, what are their powers? As to individual States and the United States, the constitution marks the boundary of powers. Whatever power is deposited with the Union by the people for their own necessary security, is so far a curtailing of the power and prerogatives of the States. This is, as it were, a self-evident proposition; at least it cannot be contested. Thus the power of declaring war, making peace, raising and supporting armies for public defense, levying duties, excises, and taxes, if necessary, with many other powers, are lodged in Congress, and are a most essential abridgement of State sovereignty. Again, the restrictions upon the States. "No State shall enter into any treaty, alliance, or confederation, coin money, emit bills of credit, make anything but gold and silver a tender in payment of debts, pass any law impairing the obligation of contracts; these, with a number of others, are important restrictions of the power of States, and were thought necessary to maintain the Union, and to establish some fundamental uniform principles of public justice throughout the whole Union. So that I think no argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole. If the constitution is found inconvenient in practice in this or

any other particular, it is well that a regular mode is pointed out for amendment. But while it remains, all offices, legislative, executive, and judicial, both of the States and of the Union, are bound by oath to support it.

One other objection has been suggested; that if a State may be sued by a citizen of another State, then the United States may be sued by a citizen of any one of the States, or, in other words, by any of their citizens. If this be a necessary consequence, it must be so. I doubt the consequence from the different wording of the different clauses, connected with other reasons. When speaking of the United States, the constitution says, "controversies to which the United States shall be a party," not controversies between the United States and any of their citizens. When speaking of States, it says, "controversies between two or more States, between a State and citizens of another State." As to reasons for citizens suing a different State which do not hold equally good for suing the United States, one may be, that as controversies between a State and citizens of another State might have a tendency to involve both States in contest, and perhaps in war, a common umpire to decide such controversies may have a tendency to prevent the mischief. That an object of this kind was had in view by the framers of the constitution, I have no doubt, when I consider the clashing interfering laws which were made in the neighboring States before the adoption of the constitution, and some affecting the property of citizens of another State in a very different manner from that of their own citizens. But I do not think it necessary to enter fully into the question, whether the United States are liable to be sued by an individual citizen, in order to decide the point before us. Upon the whole, I am of opinion that the constitution warrants a suit against a State by an individual citizen of another State. . . .

JAY, C. J. . . . Let us now proceed to inquire whether Georgia has not, by being a party to the national compact, consented to be suable by individual citizens of another State. This inquiry naturally leads our attention, 1st. To the design of the constitution. 2d. To the letter and express declaration in it.

Prior to the date of the constitution, the people had not any national tribunal to which they could resort for justice; the distribution of justice was then confined to State judicatories, in whose institution and organization the people of the other States had no participation, and over whom they had not the least con-

trol. There was then no general court of appellate jurisdiction by whom the errors of State courts, affecting either the nation at large or the citizens of any other State, could be revised and corrected. Each State was obliged to acquiesce in the measure of justice which another State might yield to her or to her citizens; and that even in cases where State considerations were not always favorable to the most exact measure. There was danger that from this source animosities would in time result; and as the transition from animosities to hostilities was frequent in the history of independent States, a common tribunal for the termination of controversies became desirable, from motives both of justice and of policy.

Prior also to that period the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations, and it was their interest as well as their duty to provide that those laws should be respected and obeyed; in their national character and capacity the United States were responsible to foreign nations for the conduct of each State, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to State courts, and particularly to the courts of delinquent States, became apparent. While all the States were bound to protect each and the citizens of each, it was highly proper and reasonable that they should be in a capacity not only to cause justice to be done to each, and the citizens of each, but also to cause justice to be done by each, and the citizens of each, and that, not by violence and force, but in a stable, sedate, and regular course of judicial procedure.

These were among the evils against which it was proper for the nation, that is, the people of all the United States, to provide by a national judiciary, to be instituted by the whole nation, and to be responsible to the whole nation.

Let us now turn to the constitution. The people therein declare that their design in establishing it comprehended six objects. 1st. To form a more perfect union. 2d. To establish justice. 3d. To insure domestic tranquillity. 4th. To provide for the common defense. 5th. To promote the general welfare. 6th. To secure the blessings of liberty to themselves and their posterity.

. . .

It may be asked, what is the precise sense and latitude in which the words "to establish justice," as here used, are to be understood? The answer to this question will result from the provisions made in the constitution on this head. They are specified

in the second section of the third article, where it is ordained that the judicial power of the United States shall extend to ten descriptions of cases, namely: 1st. To all cases arising under this constitution; because the meaning, construction, and operation of a compact ought always to be ascertained by all the parties, or by authority derived only from one of them. 2d. To all cases arising under the laws of the United States; because as such laws, constitutionally made, are obligatory on each State, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3d. To all cases arising under treaties made by their authority; because, as treaties are compacts made by, and obligatory on the whole nation, their operation ought not to be affected or regulated by the local laws or courts of a part of the nation. 4th. To all cases affecting ambassadors, or other public ministers and consuls; because, as these are officers of foreign nations, whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority. 5th. To all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose right and privileges relative thereto are regulated by the laws of nations and treaties, such cases necessarily belong to national jurisdiction. 6th. To controversies to which the United States shall be a party; because, in cases in which the whole people are interested it would not be equal or wise to let any one State decide and measure out the justice due to others. 7th. To controversies between two or more States; because domestic tranquillity requires that the contentions of States should be peaceably terminated by a common judicatory; and, because, in a free country, justice ought not to depend on the will of either of the litigants. 8th. To controversies between a State and citizens of another State; because, in case a State (that is, all the citizens of it) has demands against some citizens of another State, it is better that she should prosecute their demands in a national court, than in a court of the State to which those citizens belong; the danger of irritation and criminations arising from apprehensions and suspicions of partiality being thereby obviated; because, in cases where some citizens of one State have demands against all the citizens of another State, the cause of liberty and the rights of men forbid that the latter should be the sole judges of the justice due to the latter; and true republican government requires that free and equal citizens should have free, fair, and equal justice. 9th. To controversies between citi-

zens of the same State, claiming lands under grants of different States; because, as the rights of the two States to grant the land are drawn into question, neither of the two States ought to decide the question. 10th. To controversies between a State or the citizens thereof and foreign States, citizens or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations, or people, ought to be ascertained by, and depend on, national authority. Even this cursory view of the judicial powers of the United States leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty, and the equal right of the people.

The question now before us renders it necessary to pay particular attention to that part of the second section which extends the judicial power "to controversies between a State and citizens of another State." It is contended that this ought to be construed to reach none of these controversies, excepting those in which a State may be plaintiff. The ordinary rules for construction will easily decide whether those words are to be understood in that limited sense.

This extension of power is remedied, because it is to settle controversies. It is, therefore, to be construed liberally. It is politic, wise, and good, that not only the controversies in which a State is plaintiff, but also those in which a State is defendant, should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain, and literal sense of the words forbid it. If we attend to the words, we find them to be express, positive, free from ambiguity, and without room for such implied expressions: "The judicial power of the United States shall extend to controversies between a State and citizens of another State." If the constitution really meant to extend these powers only to those controversies in which a State might be plaintiff, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in any part of the constitution. It cannot be pretended that where citizens urge and insist upon demands against a State, which the State refuses to admit and comply with, that there is no controversy between them. If it is a controversy between them, then it clearly falls not only within the spirit, but the very words of the

constitution. What is it to the cause of justice, and how can it affect the definition of the word controversy, whether the demands which cause the dispute are made by a State against citizens of another State, or by the latter against the former? When power is thus extended to a controversy, it necessarily, as to all judicial purposes, is also extended to those between whom it subsists. . . .

We find the same general and comprehensive manner of expressing the same ideas in a subsequent clause, in which the constitution ordains that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the supreme court shall have original jurisdiction." Did it mean here party plaintiff? If that only was meant, it would have been easy to have found words to express it. Words are to be understood in their ordinary and common acceptation, and the word party being in common usage applicable both to plaintiff and defendant, we cannot limit it to one of them in the present case. We find the legislature of the United States expressing themselves in the like general and comprehensive manner; they speak, in the thirteenth section of the judicial act, of controversies where a State is a party, and as they do not impliedly or expressly apply that term to either of the litigants in particular, we are to understand them as speaking of both. In the same section they distinguish the cases where ambassadors are plaintiffs, from those in which ambassadors are defendants, and make different provisions respecting those cases; and it is not unnatural to suppose that they would, in like manner, have distinguished between cases where a State was plaintiff and where a State was defendant, if they had intended to make any difference between them, or if they had apprehended that the constitution had made any difference between them.

I perceive, and therefore candor urges me to mention, a circumstance, which seems to favor the opposite side of the question. It is this: The same section of the constitution which extends the judicial power to controversies "between a State and the citizens of another State," does also extend that power to controversies to which the United States are a party. Now it may be said, if the word party comprehends both plaintiff and defendant, it follows that the United States may be sued by any citizen, between whom and them there may be a controversy. This appears to me to be fair reasoning; but the same principles of candor which urge me to mention this objection, also urge me to suggest an important differ-

ence between the two cases. It is this: In all cases of actions against States or individual citizens the national courts are supported in all their legal and constitutional proceedings and judgments by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction important conclusions are deducible, and they place the case of a State, and the case of the United States, in very different points of view. . . .

For the reasons before given, I am clearly of opinion that a State is suable by citizens of another State; but lest I should be understood in a latitude beyond by meaning, I think it necessary to subjoin this caution, namely, That such suability may nevertheless not extend to all the demands, and to every kind of action; there may be exceptions. For instance, I am far from being prepared to say that an individual may sue a State on bills of credit issued before the constitution was established, and which were issued and received on the faith of the State, and at a time when no ideas or expectations of judicial interposition were entertained or contemplated. . . .

[Justice Iredell delivered a dissenting opinion. Justice Blair rendered a concurring opinion.]

Note.—"The question, in short, was, whether the Constitution was a bond of national unity, or such federal league only as would be dissoluble at the pleasure of any party to it. . . . Justice Wilson, the ablest and most learned of the associates, took the national view and was supported by two others. The Chief Justice was thus enabled to declare as the opinion of the court, that under the Constitution of the United States, sovereignty belonged to the people of the United States. . . . The doctrine of an indissoluble Union, though not in terms declared, is nevertheless in its elements at least contained in the decision. The qualified sovereignty, national and State, the subordination of State to nation, the position of the citizen as at once a necessary component part of the federal and of the State system, are all exhibited. It must logically follow that a nation as a sovereignty is possessed of all those powers of independent action and self-protection which the successors of Jay subsequently demonstrated were by implication conferred upon it." Cooley in Constitutional History as seen in American Law, 48, 49.

"It is not rational to suppose that a sovereign power shall be dragged before a court. The intent is to enable States to recover

claims of individuals residing in other States." John Marshall in the Virginia Convention of 1787, Elliot's Debates, III, 555. A similar opinion is expressed by Hamilton in The Federalist, No. 81.

"The decision was pronounced on the 18th of February, 1793; two days afterward the Eleventh Amendment to the Constitution was proposed to Congress." Carson, The Supreme Court of the United States, 177.

For an adverse criticism of the judgment rendered in this case, see the opinion of the court in Hans v. Louisiana, 134 U. S., 1.

MARTIN, Heir at Law and Devisee of Fairfax, v. HUNTER'S LESSEE.

1 Wheaton, 304. Decided 1816.

This case is fully stated in the opinion of the court. . . .

Story, J., delivered the opinion of the court.

This is a writ of error from the court of appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause, at February term, 1813, to be carried into due execution. The following is the judgment of the court of appeals rendered on the mandate: "The court is unanimously of opinion, that the appellate power of the supreme court of the United States does not extend to this court, under a sound construction of the constitution of the United States; that so much of the 25th section of the act of congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the supreme court to this court, is not in pursuance of the constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the supreme court were *coram non judice,* in relation to this court, and that obedience to its mandate be declined by the court." . . .

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by "the people of the United States." There can be no doubt that it was com-

petent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the States the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the States depend upon their own constitutions; and the people of every State had the right to modify and restrain them, according to their own views of policy or principle. On the other hand it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the constitution, which declares that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The constitution, unavoidably, deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but

was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; restrictions and specifications, which at the present might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require.

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the constitution, so far as regards the great points in controversy.

The third article of the constitution is that which must principally attract our attention. . . .

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the constitution to the supreme court in all cases where it has not original jurisdiction, subject, however, to such exceptions and regulations as congress may prescribe. It is, therefore, capable of embracing every case enumerated in the constitution, which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the constitution to the supreme court. There can be no doubt that congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the constitution in the most general terms, and may, therefore, be exercised by congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the constitution, the appellate jurisdiction is not limited as to the supreme court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend to all cases," &c., and "in all other cases be-

fore mentioned the supreme court shall have appellate jurisdiction." It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualifications as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to all cases arising under the constitution, laws, and treaties of the United States, or to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some, cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution without control, then the appellate jurisdiction of the United States, might, as to such cases, have no real existence, contrary to the manifest intent of the constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the *casus fœderis* should arise directly, but when it should arise, incidentally, in cases pending in state courts. This construction would abridge the jurisdiction of such court far more than has been ever contemplated in any act of congress.

On the other hand, if, as has been contended, a discretion be vested in congress to establish, or not to establish, inferior courts at their own pleasure, and congress should not establish such courts, the appellate jurisdiction of the supreme court would have nothing to act upon, unless it could act upon cases pending in the state courts. Under such circumstances, it must be held that the appellate power would extend to state courts; for the constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the constitution in relation to the whole appellate power.

But it is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution, or laws of any State to the contrary notwithstanding." It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the State, but according to the constitution, laws, and treaties of the United States, "the supreme law of the land."

A moment's consideration will show us the necessity and propriety, of this provision in cases where the jurisdiction of the state courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same State, and performance thereof is sought in the courts of that State; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose, at the trial, the defendant sets up in his defense a tender under a state law, making paper money a good tender, or a state law, impairing the obligation of such contract, which law, if binding, would defeat the suit. The constitution of the United States has declared that no State shall make anything but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the state court proceed to hear and determine it? Can a mere plea in defense be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a state court, and the defendant should allege in his defense that the crime was created by an ex post facto act of the State, must not the state court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defense? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumer-

able instances of the same sort might be stated in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue.

It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur; it must therefore extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the constitution.

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments, and the spirit of the constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that, if the power exists, it will materially impair the sovereignty of the States, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake that the constitution was not designed to operate upon States, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the States. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the constitution does not act upon the States. The language of the constitution is also imperative upon the States, as to the performance of many duties. It is imperative upon the state legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of president and vice-president.

And in these, as well as in some other cases, congress have a right to revise, amend, or supersede the laws which may be passed by state legislatures. When, therefore, the States are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the States are, in some respects, under the control of congress, and in every case are, under the constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the constitution; and if they should unintentionally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of state sovereignty.

The argument urged from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to engraft upon a general power, a restriction which is not to be found in the terms in which it is given. From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse. In all questions of jurisdiction the inferior, or appellate court must pronounce the final judgment; and common-sense, as well as legal reasoning, has conferred it upon the latter.

It has been further argued against the existence of this appellate power, that it would form a novelty in our judicial institutions. This is certainly a mistake. In the articles of confederation, an instrument framed with infinitely more deference to state rights and state jealousies, a power was given to congress, to establish "courts for revising and determining, finally, appeals in all cases of captures." It is remarkable, that no power was given to enter-

tain original jurisdiction in such cases; and, consequently, the appellate power (although not so expressed in terms) was altogether to be exercised in revising the decisions of state tribunals. This was, undoubtedly, so far a surrender of state sovereignty; but it never was supposed to be a power fraught with public danger, or destructive of the independence of state judges. On the contrary, it was supposed to be a power indispensable to the public safety, inasmuch as our national rights might otherwise be compromitted, and our national peace be endangered. Under the present constitution the prize jurisdiction is confined to the courts of the United States; and a power to revise the decisions of state courts, if they should assert jurisdiction over prize causes, cannot be less important, or less useful, than it was under the confederation.

In this connection, we are led again to the construction of the words of the constitution, "the judicial power shall extend," etc. If, as has been contended at the bar, the term "extend" have a relative signification, and mean to widen an existing power, it will then follow, that, as the confederation gave an appellate power over state tribunals, the constitution enlarged or widened that appellate power to all the other cases in which jurisdiction is given to the courts of the United States. It is not presumed that the learned counsel would choose to adopt such a conclusion.

It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts: first, because state judges are bound by an oath to support the constitution of the United States, and must be presumed to be men of learning and integrity; and, secondly, because congress must have an unquestionable right to remove all cases within the scope of the judicial power, from the state courts to the courts of the United States, at any time before final judgment, though not after final judgment. As to the first reason—admitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States (which we very cheerfully admit), it does not aid the argument. It is manifest that the constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or con-

trol, the regular administration of justice. Hence, in controversies between States; between citizens of different States; between citizens claiming grants under different States; between a State and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases—the cases arising under the constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction—reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy, in any two States. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

There is an additional consideration, which is entitled to great weight. The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct,

it will follow, that as the plaintiff may always elect the state court, the defendant may be deprived of all the security which the constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted congress possess to remove suits from state courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as congress is not limited by the constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after the judgment. The time, the process, and the manner, must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied, by the legislature, to interlocutory as well as final judgments. And if the right of removal from state courts exists before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the constitution does not include cases pending in state courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of state tribunals.

The remedy, too, of removal of suits would be utterly inadequate

to the purposes of the constitution, if it could act only on the parties, and not upon the state courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and, in respect to civil suits, there would, in many cases, be rights without corresponding remedies. If state courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control, and the state decisions would be paramount to the constitution; and though in civil suits the courts of the United States might act upon the parties, yet the state courts might act in the same way; and this conflict of jurisdictions would not only jeopardize private rights, but bring into imminent peril the public interests.

On the whole, the court are of opinion, that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the Judiciary Act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.

Strong as this conclusion stands upon the general language of the constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the supreme court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States in the Union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the supreme court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of

the supreme court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts. . . .

It is the opinion of the whole court, that the judgment of the court of appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the district court, held at Winchester, be, and the same is hereby affirmed.

[Mr. Justice Johnson delivered a concurring opinion.]

COHENS v. THE STATE OF VIRGINIA.

6 Wheaton, 264. Decided 1821.

[The facts are sufficiently stated in the opinion of the court.]

Marshall, C. J., delivered the opinion of the court.

This is a writ of error to a judgment rendered in the court of Hustings, for the borough of Norfolk, on an information for selling lottery tickets, contrary to an act of the legislature of Virginia. In the state court, the defendant claimed the protection of an act of congress. A case was agreed between the parties, which states the act of assembly on which the prosecution was founded, and the act of congress on which the defendant relied, and concludes in these words: "If upon this case the court shall be of opinion that the acts of congress before mentioned were valid, and, on the true construction of those acts, the lottery tickets sold by the defendants as aforesaid, might lawfully be sold within the State of Virginia, notwithstanding the act or statute of the general assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants. And if the court should be of opinion that the statute or act of the general assembly of the State of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of congress, then judgment to be entered that the defendants are guilty, and that the commonwealth recover against them one hundred dollars and costs."

Judgment was rendered against the defendants; and the court in which it was rendered being the highest court of the State in which the cause was cognizable, the record has been brought into this court by writ of error.

The defendant in error moves to dismiss this writ, for want of jurisdiction.

In support of this motion, three points have been made, and argued with the ability which the importance of the question merits. These points are:—

1. That a State is a defendant.
2. That no writ of error lies from this court to a state court.
3. The third point has been presented in different forms by the gentlemen who have argued it. The counsel who opened the cause said that the want of jurisdiction was shown by the subject-matter of the case. The counsel who followed him said that jurisdiction was not given by the Judiciary Act. The court has bestowed all its attention on the arguments of both gentlemen, and supposes that their tendency is to show that this court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the state court, because neither the constitution nor any law of the United States has been violated by that judgment.

The questions presented to the court by the first two points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every State in the Union. That the constitution, laws, and treaties, may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

If such be the constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this court to say so; and

to perform that task which the American people have assigned to the judicial department.

1. The first question to be considered is, whether the jurisdiction of this court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State?

The 2d section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more States, between a State and citizens of another State," "and between a State and foreign states, citizens, or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.

The counsel for the defendant in error have stated that the cases which arise under the constitution must grow out of those provisions which are capable of self-execution; examples of which are to be found in the second section of the fourth article, and in the tenth section of the first article.

A case which arises under a law of the United States must, we are likewise told, be a right given by some act which becomes necessary to execute the powers given in the constitution, of which the law of naturalization is mentioned as an example.

The use intended to be made of this exposition of the first part of the section, defining the extent of the judicial power, is not clearly understood. If the intention be merely to distinguish cases arising under the constitution, from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be to maintain that a case arising under the constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think the construction

too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution, in the 25th section of the Judiciary Act; and we perceive no reason to depart from that construction.

The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.

The counsel for the defendant in error have undertaken to do this; and have laid down the general proposition, that a sovereign independent State is not suable, except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a State has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If upon a just construction of that instrument, it shall appear that the State has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has intrusted that power to a tribunal in whose impartiality it confides.

The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent States. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective States, adopted the present constitution.

If it could be doubted whether, from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the

authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared that they are given "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States; but in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases, of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our constitution, the subordination of the state governments to the constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department, are we at liberty to insert in this general grant, an exception of those

cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case. . . .

It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one. . . .

We think, then, that as the Constitution originally stood, the appellate jurisdiction of this court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party.

This leads to a consideration of the 11th amendment.

It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State."

It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign state. The jurisdiction of the court

still extends to these cases; and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a State is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation. . . .

Under the Judiciary Act,[1] the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a State obtains a judgment against an individual, and the court rendering such judgment overrules a defense set up under the constitution or laws of the United States, the transfer of this record into the supreme court for the sole purpose of inquiring whether the judgment violates the constitution of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. . . . He only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the constitution and laws of the Union. . . .

[1] 1 Stats. at Large, 73.

The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the Judiciary Act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court, where they have, like those in favor of an individual, been re-examined, and affirmed or reversed. It has never been suggested that such a writ of error was a suit against the United States, and therefore not within the jurisdiction of the appellate court.

It is, then, the opinion of the court, that the defendant who removes a judgment rendered against him by a state court into this court, for the purpose of re-examining the question whether that judgment be a violation of the constitution or laws of the United States, does not commence or prosecute a suit against the State, whatever may be its opinion where the effect of the writ may be to restore the party to the possession of a thing which he demands.

But should we in this be mistaken, the error does not affect the case now before the court. If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted "by a citizen of another State, or by a citizen or subject of any foreign state." It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen that, in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.

2. The second objection to the jurisdiction of the court is, that its appellate power cannot be exercised, in any case, over the judgment of a state court.

This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a State from that of the Union, and their entire independence of each other. The argument considers the federal judiciary as completely foreign to that of a State; and as being no more connected with it, in any respect whatever, than the court of a foreign State. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the constitution, the argument fails with it.

This hypothesis is not founded on any words in the constitu-

tion, which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of state courts, with that constitutional relation which subsists between the government of the Union and the governments of those States which compose it.

Let this unreasonableness, this total incompatibility, be examined.

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests, in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire,—for some purposes sovereign, for some purposes subordinate.

In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a State, if it be repugnant to the constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a state tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the constitution?

We think it is not. We think that in a government acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may con-

travene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

The propriety of intrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgments rendered in them by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws, and treaties of the United States; and if a case of this description brought in a state court cannot be removed before judgment, nor revised after judgment, then the construction of the constitution, laws, and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the state courts, however, they may be constituted. "Thirteen independent courts," says a very celebrated statesman (and we have now more than twenty such courts), "of final jurisdiction over the same causes, arising upon the same laws, is a hydra of government, from which nothing but contradiction and confusion can proceed."

Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a State or its courts, the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.

We are not restrained, then, by the political relations between the general and state governments, from construing the words of the constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

They give to the supreme court appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. . . . Let the nature and objects of our Union be considered; let the great fundamental principles on which the fabric stands be examined; and we think the result must be that there is nothing so extravagantly absurd in giving to the court of the nation the power of revising the decisions of local tribunals, on questions which

affect the nation, as to require that words which import this power should be restricted by a forced construction. . . .

Motion Denied.

The cause was thereupon argued on the merits. . . .

Judgment Affirmed.

UNITED STATES v. TEXAS.

143 U. S., 621. Decided 1892.

[The facts are sufficiently stated in the opinion of the court.]

Mr. Justice Harlan delivered the opinion of the court.

This suit was brought by original bill in this court pursuant to the act of May 2, 1890, providing a temporary government for the Territory of Oklahoma. The 25th section recites the existence of a controversy between the United States and the State of Texas as to the ownership of what is designated on the map of Texas as Greer County, and provides that the act shall not be construed to apply to that county until the title to the same has been adjudicated and determined to be in the United States. In order that there might be a speedy and final judicial determination of this controversy the Attorney-General of the United States was authorized and directed to commence and prosecute on behalf of the United States a proper suit in equity in this court against the State of Texas, setting forth the title of the United States to the country lying between the North and South Forks of the Red River where the Indian Territory and the State of Texas adjoin, east of the one hundredth degree of longitude, and claimed by the State of Texas as within its boundary. 26 Stat., 81, 92, c. 182, § 25.

The State of Texas appeared and filed a demurrer, and, also, an answer denying the material allegations of the bill. The case is now before the court only upon the demurrer, the principal grounds of which are: That the question presented is political in its nature and character, and not susceptible of judicial determination by this court in the exercise of its jurisdiction as conferred by the Constitution and laws of the United States; that it is not competent for the general government to bring suit against a State of the Union in one of its own courts, especially when the right to be maintained is mutually asserted by the United States and the State, namely, the ownership of certain designated territory; and that the plaintiff's cause of action, being a suit to recover

real property, is legal and not equitable, and, consequently, so much of the act of May 2, 1890, as authorizes and directs the prosecution of a suit in equity to determine the rights of the United States to the territory in question is unconstitutional and void. . . . [Here follows a history of the conflicting claims of the United States and Texas.]

The bill alleges that the State of Texas, without right, claims, has taken possession of, and endeavors to extend its laws and jurisdiction over, the disputed territory, in violation of the treaty rights of the United States; that, during the year 1887, it gave public notice of its purpose to survey and place upon the market for sale, and otherwise dispose of, that territory; and that, in consequence of its proceeding to eject bona fide settlers from certain portions thereof, President Cleveland, by proclamation issued December 30, 1887, warned all persons, whether claiming to act as officers of the county of Greer, or otherwise, against selling or disposing of, or attempting to sell or dispose of, any of said lands, or from exercising or attempting to exercise any authority over them, and "against purchasing any part of said territory from any person or persons whatever." 25 Stat., 1483.

The relief asked is a decree determining the true line between the United States and the State of Texas, and whether the land constituting what is called "Greer County" is within the boundary and jurisdiction of the United States or of the State of Texas. The government prays that its rights, as asserted in the bill, be established, and that it have such other relief as the nature of the case may require.

In support of the contention that the ascertainment of the boundary between a Territory of the United States and one of the States of the Union is political in its nature and character, and not susceptible of judicial determination, the defendant cites Foster v. Neilson, 2 Pet., 253, 307, 309; Cherokee Nation v. Georgia, 5 Pet., 1, 21; United States v. Arredondo, 6 Pet., 691, 711; and Garcia v. Lee, 12 Pet., 511, 517.

In Foster v. Neilson, which was an action to recover certain lands in Louisiana, the controlling question was as to whom the country between the Iberville and the Perdido rightfully belonged at the time the title of the plaintiff in that case was acquired. The United States, the court said, had perseveringly insisted that by the treaty of St. Ildefonso, made October 1, 1800, Spain ceded the disputed territory as part of Louisiana to France, and that France by the treaty of Paris of 1803 ceded it to the United States. Spain insisted that the cession to France comprehended only the territory

which was at that time denominated Louisiana. After examining various articles of the treaty of St. Ildefonso, Chief Justice Marshall, speaking for the court, said: "In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous." Again: "After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty, by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are trusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and, in its discussion, the courts of every country must respect the pronounced will of the legislature."

In United States v. Arredondo the court, referring to Foster v. Neilson, said: "This court did not deem the settlement of boundaries a judicial but a political question—that it was not its duty to lead, but to follow the action of the other departments of the government." The same principles were recognized in Cherokee Nation v. Georgia and Garcia v. Lee.

These authorities do not control the present case. They relate to questions of boundary between independent nations, and have no application to a question of that character arising between the General Government and one of the States composing the Union, or between two States of the Union. By the Articles of Confederation, Congress was made "the last resort on appeal in all disputes and differences" then subsisting or which thereafter might arise "between two or more States concerning boundary, jurisdic-

tion, or any other cause whatever;" the authority so conferred to be exercised by a special tribunal to be organized in the mode prescribed in those Articles, and its judgment to be final and conclusive. Art. 9. At the time of the adoption of the Constitution, there existed, as this court said in Rhode Island v. Massachusetts, 12 Pet., 657, 723, 724, controversies between eleven States, in respect to boundaries, which had continued from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these and like controversies that might arise, under the new government to be formed, must, therefore, have been perceived by the framers of the Constitution, and, consequently, among the controversies to which the judicial power of the United States was extended by the Constitution, we find those between two or more States. And that a controversy between two or more States, in respect to boundary, is one to which, under the Constitution, such judicial power extends, is no longer an open question in this court. The cases of Rhode Island v. Massachusetts, 12 Pet., 657; New Jersey v. New York, 5 Pet., 284, 290; Missouri v. Iowa, 7 How., 660; Florida v. Georgia, 17 How., 478; Alabama v. Georgia, 23 How., 505; Virginia v. West Virginia, 11 Wall., 39, 55; Missouri v. Kentucky, 11 Wall., 395; Indiana v. Kentucky, 136 U. S., 479; and Nebraska v. Iowa, ante, 359, were all original suits, in this court, for the judicial determination of disputed boundary lines between States. In New Jersey v. New York, 5 Pet., 284, 290, Chief Justice Marshall said: "It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing acts of Congress." And in Virginia v. West Virginia, it was said by Mr. Justice Miller to be the established doctrine of this court, "that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding." So, in Wisconsin v. Pelican Ins. Co., 127 U. S., 265, 287, 288: "By the Constitution, therefore, this court has original jurisdiction of suits brought by a State against citizens of another State, as well as of controversies between two States. . . . As to 'controversies between two or more States.' The most numerous class of which this court has entertained jurisdiction is that of controversies between two States as

to the boundaries of their territory, such as were determined before the Revolution by the King in Council, and under the Articles of Confederation (while there was no national judiciary) by committees or commissioners appointed by Congress."

In view of these cases, it cannot, with propriety, be said that a question of boundary between a Territory of the United States and one of the States of the Union is of a political nature, and not susceptible of judicial determination by a court having jurisdiction of such a controversy. The important question therefore is, whether this court can, under the Constitution, take cognizance of an original suit brought by the United States against a State to determine the boundary between one of the Territories and such State. Texas insists that no such jurisdiction has been conferred upon this court, and that the only mode in which the present dispute can be peaceably settled is by agreement, in some form, between the United States and that State. Of course, if no such agreement can be reached—and it seems that one is not probable—and if neither party will surrender its claim of authority and jurisdiction over the disputed territory, the result, according to the defendant's theory of the Constitution, must be that the United States, in order to effect a settlement of this vexed question of boundary, must bring its suit in one of the courts of Texas—that State consenting that its courts may be open for the assertion of claims against it by the United States—or that, in the end, there must be a trial of physical strength between the government of the Union and Texas. The first alternative is unwarranted both by the letter and spirit of the Constitution. Mr. Justice Story has well said: "It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced, if at all, in the State tribunals." Story Const., § 1674. The second alternative, above mentioned, has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern.

The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary. Did they omit to provide

for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by United States v. North Carolina, 136 U. S., 211. That was an action of debt brought in this court by the United States against the State of North Carolina, upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits, and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State. As, however, the question of jurisdiction is vital in this case, and is distinctly raised, it is proper to consider it upon its merits. . . . [Here follows a recital of art. 3, § 2, of the Constitution, and the 11th amendment.]

It is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and, in the other, on the character of the parties, whatever may be the subject of controversy. Cohens v. Virginia, 6 Wheat., 264, 378, 393. The present suit falls in each class, for it is, plainly, one arising under the Constitution, laws and treaties of the United States, and, also, one in which the United States is a party. It is, therefore, one to which, by the express words of the Constitution, the judicial power of the United States extends. That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a State, is clear; for by the Revised Statutes it is declared—as was done by the Judiciary Act of 1789—that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." Rev. Stat., § 687; Act of September 24, 1789, c. 20, § 13; 1 Stat., 80. Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation. Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?

The words in the Constitution, "in all cases . . . in which

a State shall be party, the Supreme Court shall have original jurisdiction," necessarily refer to all cases mentioned in the preceding clause in which a State may be made, of right, a party defendant, or in which a State may, of right, be a party plaintiff. It is admitted that these words do not refer to suits brought against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States, even where such suits arise under the Constitution, laws and treaties of the United States, because the judicial power of the United States does not extend to suits of individuals against States. Hans v. Louisiana, 134 U. S., 1, and authorities there cited; North Carolina v. Temple, 134 U. S., 22, 30. It is, however, said that the words last quoted refer only to suits in which a State is a party, and in which, also, the opposite party is another State of the Union or a foreign State. This cannot be correct, for it must be conceded that a State can bring an original suit in this court against a citizen of another State. Wisconsin v. Pelican Ins. Co., 127 U. S., 265, 287. Besides, unless a State is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits the correct decision of which depends upon the Constitution, laws or treaties of the United States—are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States "to all cases," in law and equity, arising under the Constitution, laws and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction "in all cases" "in which a State shall be party," that is, in all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States. The present case is of the former class. We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately

committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State. . . . [Here is given an extract from Hans v. Louisiana, 134 U. S., 1.]

That case and others in this court relating to the suability of States, proceeded upon the broad ground that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."

The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," McCulloch v. State of Maryland, 4 Wheat., 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to all cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States), and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, "in which a State shall be party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was

given by Texas when admitted into the Union upon an equal footing in all respects with the other States.

We are of opinion that this court has jurisdiction to determine the disputed question of boundary between the United States and Texas.

It is contended that, even if this court had jurisdiction, the dispute as to boundary must be determined in an action at law, and that the act of Congress requiring the institution of this suit in equity is unconstitutional and void, as, in effect, declaring that legal rights shall be tried and determined as if they were equitable rights. [Here follows a discussion of Fowler v. Lindsey, 3 Dall., 411, and Rhode Island v. Massachusetts, 12 Pet., 657.] In view of these precedents, it is scarcely necessary for the court to examine this question anew. Of course, if a suit in equity is appropriate for determining the boundary between two States, there can be no objection to the present suit as being in equity and not at law.

It is not a suit simply to determine the legal title to, and the ownership of, the lands constituting Greer County. It involves the larger question of governmental authority and jurisdiction over that territory. The United States, in effect, asks the specific execution of the terms of the treaty of 1819, to the end that the disorder and public mischiefs that will ensue from a continuance of the present condition of things may be prevented. The agreement, embodied in the treaty, to fix the lines with precision, and to place landmarks to designate the limits of the two contracting nations, could not well be enforced by an action at law. The bill and amended bill make a case for the interposition of a court of equity. *Demurrer overruled.*

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE LAMAR, dissenting.

MR. JUSTICE LAMAR and myself are unable to concur in the decision just announced.

This court has original jurisdiction of two classes of cases only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

The judicial power extends to "controversies between two or more States;" "between a State and citizens of another State;" and "between a State or the citizens thereof, and foreign States, citizens or subjects." Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases

enumerated, in which a State may be a party, and this is not one of them.

The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.

We are of opinion, therefore, that this case it not within the original jurisdiction of the court.

XV. POLITICAL QUESTIONS.

LUTHER v. BORDEN.

7 Howard, 1. Decided 1848.

THE first of these cases came up by a writ of error, the second upon a certificate of division of opinion by the judges of the circuit court of the United States for the district of Rhode Island. The first case is stated in the opinion of the court. The second requires no statement, as it went off, for want of jurisdiction. . . .

TANEY, C. J., delivered the opinion of the court.

This case has arisen out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842.

It is an action of trespass brought by Martin Luther, the plaintiff in error, against Luther M. Borden and other defendants, in the circuit court of the United States for the district of Rhode Island, for breaking and entering the plaintiff's house. The defendants justify upon the ground that large numbers of men were assembled in different parts of the State for the purpose of overthrowing the government by military force, and were actually levying war upon the State; that, in order to defend itself from this insurrection, the State was declared by competent authority to be under martial law; that the plaintiff was engaged in the insurrection; and that the defendants, being in the military service of the State, by command of their superior officer, broke and entered the house and searched the rooms for the plaintiff, who was supposed to be there concealed, in order to arrest him, doing as little damage as possible. The plaintiff replied, that the trespass was committed by the defendants of their own proper wrong, and without any such cause; and upon the issue joined on this replication, the parties proceeded to trial. . . . The existence and authority of the government under which the defendants acted, was called in question; and the plaintiff insists, that, before the acts complained of were committed, that government had been dis-

placed and annulled by the people of Rhode Island, and that the plaintiff was engaged in supporting the lawful authority of the State, and the defendants themselves were in arms against it. . .

The fourth section of the fourth article of the constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the constitution it rests with congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

So, too, as relates to the clause in the above-mentioned article of the constitution, providing for cases of domestic violence. It rested with congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere. But congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive, when the legislature cannot be convened, to call forth such number of militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound

to interfere, is given to the President. He is to act upon the application of the legislature, or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government, cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of congress.

After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it, and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States, or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging—if the judicial power is, at that time, bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority, if it should be found necessary for the general government to interfere; and it is admitted in the argument that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a

knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government, or in treating as wrong-doers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of congress to the sovereign States of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the constitution and laws of the United States, and must, therefore, be respected and enforced in its judicial tribunals.

A question very similar to this arose in the case of Martin v. Mott, 12 Wheat., 29-31. The first clause of the first section of the act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a state government. The power given to the President in each case is the same, with this difference only, that it cannot be exercised by him in the latter case, except upon the application of the legislature or executive of the State. The case above mentioned arose out of a call made by the President, by virtue of the power conferred by the first clause; and the court said that "whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." The grounds upon which that opinion is maintained are set forth in the report, and, we think, are conclusive. The same principle applies to the case now before the court. Undoubtedly,

if the President, in exercising this power, shall fall into error, or invade the rights of the people of the State, it would be in the power of congress to apply the proper remedy. But the courts must administer the law as they find it. . . .

The remaining question is, whether the defendants, acting under military orders issued under the authority of the government, were justified in breaking and entering the plaintiff's house. In relation to the act of the legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a State. Unquestionably, a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the state authorities. And unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and of free institutions, and is as necessary to the States of this Union, as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things, the officers engaged in its military service might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable. . . .

Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of the state sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.

The judgment of the circuit court must, therefore, be affirmed.

STATE OF MISSISSIPPI v. JOHNSON, PRESIDENT.

4 Wallace, 475. Decided 1866.

THIS was a motion made by Messrs. Sharkey and R. J. Walker, on behalf of the State of Mississippi, for leave to file a bill in the name of the State praying this court perpetually to enjoin and restrain Andrew Johnson, a citizen of the State of Tennessee and President of the United States, and his officers and agents appointed for that purpose, and especially E. O. C. Ord, assigned as military commander of the district where the State of Mississippi is, from executing or in any manner carrying out two acts of Congress named in the bill, one "An act for the more efficient government of the rebel states," passed March 2d, 1867, notwithstanding the President's veto of it as unconstitutional, and

the other an act supplementary to it, passed in the same way March 23d, 1867; acts commonly called the Reconstruction Acts.

The former of these acts, reciting that no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas, and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established, divided the States named into five military districts, and made it the duty of the President to assign to each one an officer of the army, and to detail a sufficient military force to enable him to perform his duties and enforce his authority within his district. It made it the duty of this officer to protect all persons in their rights, to suppress insurrection, disorder, violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, either through the local civil tribunals or through military commissions, which the act authorized. It provided, further, that on the formation of new constitutions and certain conditions which the act prescribed, the States respectively shall be declared entitled to representation in Congress and the preceding part of the act become inoperative; and that until they were so admitted any civil governments which might exist in them should be deemed provisional only, and subject to the paramount authority of the United States, at any time to abolish, modify, control, or supersede it.

The second of the two acts related chiefly to the registration of voters who were to form the new constitutions of the States in question.

The bill set out the political history of Mississippi so far as related to its having become one of the United States; and "that forever after it was impossible for her people, or for the State in its corporate capacity, to dissolve that connection with the other States, and that any attempt to do so by secession or otherwise was a nullity;" and she "now solemnly asserted that her connection with the Federal government was not in anywise thereby destroyed or impaired;" and she averred and charged "that the Congress of the United States cannot constitutionally expel her from the Union, and that any attempt which practically does so is a nullity." . . . [Here follows an extract from the bills.]

It then charged that, from information and belief, the said Andrew Johnson, President, in violation of the Constitution, and in violation of the sacred rights of the States, would proceed, notwithstanding his vetoes, and as a mere ministerial duty, to the

execution of said acts, as though they were the law of the land, which the vetoes prove he would not do if he had any discretion, or that in doing so he performed anything more than a mere ministerial duty; and that with the view to the execution of said acts he had assigned General E. O. C. Ord to the command of the States of Mississippi and Arkansas.

Upon an intimation made a few days before by Mr. Sharkey, of his desire to file this bill, the Attorney-General objected to it *in limine*, as containing matter not fit to be received. The Chief Justice then stated that while as a general thing a motion to file a bill was granted as of course, yet if it was suggested that the bill contained scandalous or impertinent matter, or was in other respects improper to be received, the court would either examine the bill or refer it to a master for examination. The only matter, therefore, which would now be considered was the question of leave to file the bill. . . . .

THE CHIEF JUSTICE delivered the opinion of the court. . . .

A motion was made, some days since, in behalf of the State of Mississippi, for leave to file a bill in the name of the State, praying this court to perpetually enjoin and restrain Andrew Johnson, President of the United States, and E. O. C. Ord, general commanding in the District of Mississippi and Arkansas, from executing, or in any manner carrying out, certain acts of Congress therein named.

The acts referred to are those of March 2d, and March 23d, 1867, commonly known as the Reconstruction Acts.

The Attorney-General objected to the leave asked for, upon the ground that no bill which makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in this court.

This point has been fully argued, and we will now dispose of it.

We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

The case of Marbury v. Madison, Secretary of State,[1] furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia, and his commission had been made out, signed, and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the Secretary of State. It was held that the performance of this duty might be enforced by mandamus issuing from a court having jurisdiction.

So, in the case of Kendall, Postmaster-General, v. Stockton & Stokes,[2] an act of Congress had directed the Postmaster-General to credit Stockton & Stokes with such sums as the Solicitor of the Treasury should find due to them; and that officer refused to credit them with certain sums, so found due. It was held that the crediting of this money was a mere ministerial duty, the performance of which might be judicially enforced.

In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by mandamus.

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary acts, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the Presi-

[1] 1 Cranch, 137. [2] 12 Peters, 527.

dent might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance."

It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.

It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it.

Had it been supposed at the bar that this court would, in any case, interpose, by injunction, to prevent the execution of an unconstitutional act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.

Occasions have not been wanting.

The constitutionality of the act for the annexation of Texas was vehemently denied. It made important and permanent changes in the relative importance of States and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular States. But no one seems to have thought of an application for an injunction against the execution of the act by the President.

And yet it is difficult to perceive upon what principle the application now before us can be allowed and similar applications in that and other cases have been denied.

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress [the courts?] can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a State.

The motion for leave to file the bill is, therefore, *Denied.*

NOTE.—Whether any particular class of Indians are still to be regarded as a tribe, or have ceased to hold the tribal relation, is primarily a question for the political departments of the government, and if they have decided it, this court will follow their lead. United States v. Holliday, 3 Wallace, 407.

It belongs exclusively to the government to recognize the political existence of new foreign states, and until it does so, courts must consider the old state of things as remaining. Gelston v. Hoyt, 3 Wheaton, 246.

In a controversy between the United States and a foreign sovereign as to boundary, this court must follow the decision of that department of the government intrusted by the constitution with

the care of its foreign relations, especially if sanctioned by the legislative power. Foster v. Neilson, 2 Peters, 253.

A bill in equity filed by one of the United States to enjoin the Secretary of War and other officers who represent the Executive authority of the United States from carrying into execution certain acts of Congress, on the ground that such execution would annul and totally abolish the existing State government of the State and establish another and different one in its place—in other words, would overthrow and destroy the corporate existence of the State by depriving it of all means and instrumentalities whereby its existence might, and otherwise would, be maintained—calls for judgment upon a political question, and will therefore not be entertained by this court. State of Georgia v. Stanton, 6 Wallace, 50.

The President, in a message to congress, and in the correspondence carried on with the government of Buenos Ayres, having denied the jurisdiction of that country over the Falkland Islands, the courts must take the fact so to be. Williams v. Suffolk Insurance Co., 13 Peters, 415.

Who is the sovereign, de jure or de facto, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. Jones v. United States, 137 U. S., 202.

XVI. ENFORCEMENT OF EXECUTIVE POWER BY JUDICIAL PROCESS.

In re DEBS, Petitioner.

158 U. S., 564. Decided 1895.

[On July 2, 1894, the district attorney for the Northern District of Illinois, acting under the direction of the Attorney-General of the United States, filed a bill of complaint in the Circuit Court of the United States for the Northern District of Illinois against these petitioners and others. The bill averred that the twenty-two railroads named therein were engaged in the business of interstate commerce and also that each of them was under contract to carry the United States mails; that four of the defendants were officers of the American Railway Union; that these four officers combined with others to compel an adjustment of a dispute between the Pullman Palace Car Company and its employés by boycotting the cars of the company; that to make the boycott effective, they had prevented certain of the railroads running out of Chicago from operating their trains, and were combining to extend such boycott against the Pullman cars by causing strikes among employés of all roads attempting to haul the same; that the defendants and others unknown proceeded by collecting together in large numbers, by threats, intimidation, force and violence, to prevent the said railways from employing other persons to fill the vacancies aforesaid; that the defendants and others unknown did with force and violence obstruct, derail, and wreck the engines and trains of the said railways, both passenger and freight, engaged in interstate commerce and in carrying the United States mails. Following these allegations was a prayer for an injunction. The court thereupon ordered an injunction commanding the defendants "and all persons combining and conspiring with them, and all other persons whomsoever absolutely to desist and refrain from" doing the unlawful acts specified in the bill. The injunction was served on those of the defendants who are here as

petitioners. On July 17 the district attorney filed an information for an attachment against the four defendants, and on August 1 a similar information against the other petitioners. A hearing was had before the Circuit Court, and on December 14, these petitioners were found guilty of contempt and sentenced to imprisonment in the county jail for terms varying from three to six months. Having been committed to jail, they on January 14, 1895, applied to this court for a writ of error and also a writ of habeas corpus. The former was denied on the ground that the order of the Circuit Court was not a final judgment or decree. The latter is now to be considered.]

Mr. Justice Brewer . . . delivered the opinion of the court.

The case presented by the bill is this: The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are suggested: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as to authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in government implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty?

First. What are the relations of the general government to interstate commerce and the transportation of the mails? They are those of direct supervision, control, and management. While under the dual system which prevails with us the powers of government are distributed between the State and the Nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the State.

"The government of the Union, then, is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

"No trace is to be found in the Constitution of an intention to

create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends, and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution." Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat., 316, 405, 424.

"Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the States." Chief Justice Chase in Lane County v. Oregon, 7 Wall., 71, 76.

"We hold it be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

"This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land.'" Mr. Justice Bradley in Ex parte Siebold, 100 U. S., 371, 395. . . .

Among the powers expressly given to the national government are the control of interstate commerce and the creation and management of a post office system for the nation. . . . [Here follows a consideration of the statutes passed in the exercise of these powers.]

Obviously these powers given to the national government over interstate commerce and in respect to the transportation of the mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in full discharge

of its duty to regulate interstate commerce and carry the mails. The validity of such exercise and the exclusiveness of its control had been again and again presented to this court for consideration. It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interference with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, section 2, clause 3, of the Federal Constitution it is provided: "The trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the State where the said crime shall have been committed." If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transporation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State.

But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the

security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result. . . .

So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the government, that, instead of determining for itself questions of right and wrong on the part of these petitioners and their associates and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals, and invoked their consideration and judgment as to the measure of its rights and powers and the correlative obligations of those against whom it made complaint. And it is equally to the credit of the latter that the judgment of those tribunals was by the great body of them respected, and the troubles which threatened so much disaster terminated.

Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill. . . .

We do not care to place our decision upon this ground alone. Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assist-

ance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligation which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it standing in the court. [Here follows a discussion of United States v. San Jacinto Tin Co., 125 U. S., 273, 285, and United States v. Bell Telephone Company, 128 U. S., 315, 367.]

It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highway under its control.

As said in Gilman v. Philadelphia, 3 Wall., 713, 724: "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of the offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament of England." . . .

It is said that the jurisdiction heretofore exercised by the national government over highways has been in respect to waterways—the natural highways of the country—and not over artificial highways such as railroads; but the occasion for the exercise by Congress of its jurisdiction over the latter is of recent date. Perhaps the first act in the course of such legislation is that heretofore referred to, of June 14, 1866, but the basis upon which rests its jurisdiction over artificial highways is the same as that which supports it over the natural highways. Both spring from the power to regulate commerce. The national government has no separate dominion over a river within the limits of a State; its jurisdiction there is like that over land in the same State. Its control over the river is simply by virtue of the fact that it is one of the highways of interstate and international commerce. The great case of Gibbons v. Ogden, 9 Wheat., 1, 197, in which the control of Congress over inland waters was asserted, rested that control on the grant of the power to regulate commerce. The argument of the Chief Justice was that commerce includes navigation, "and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'" In order to fully regulate commerce with foreign nations it is essential that the power of Congress does not stop at the borders of the nation, and equally so as to commerce among the States:

"The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.' It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies."

See also Gilman v. Philadelphia, 3 Wall., 713, 725, in which it was said: "Wherever 'commerce among the States' goes, the power of the nation, as represented in this court, goes with it to protect and enforce its rights."

Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fullness of control

exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop. . . .

We have given to this case the most careful and anxious attention, for we realize that it touches closely questions of supreme importance to the people of this country. Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of these courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in con-

tempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation; that the complaint filed in this case clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mail—an obstruction not only temporarily existing, but threatening to continue; that under such complaint the Circuit Court had power to issue its process of injunction; that it having been issued and served on these defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been, then to proceed under section 725, Revised Statutes, which grants power "to punish by fine or imprisonment, . . . disobedience, . . . by any party . . . or other person, to any lawful writ, process, order, rule, decree or command," and enter the order of punishment complained of; and, finally, that, the Circuit Court, having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on habeas corpus in this or any other court. . . .

The petition for a writ of habeas corpus is *Denied.*

NOTE.—See articles by F. J. Stimson on The Modern Use of Injunctions, Political Science Quarterly, X. 189 (1895), and by William H. Dunbar on Government by Injunction, Law Quarterly Review, XIII., 347 (1897). The latter has been reprinted by the American Economic Association in Economic Studies, Vol. III., No. I.

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